No. 00-1293-CFX Title: John Ashcroft, Attorney General, Petitioner
v.
American Civil Liberties Union, et al.

Docketed: February 13, 2001 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Dec 4 2000	Application (00A493) to extend the time to file a petition for a writ of certiorari from December 14, 2000 to January 13, 2001, submitted to Justice Souter.
	Dec 5 2000	Application (00A493) granted by Justice Souter extending the time to file until January 15, 2001.
	Jan 5 2001	Application (00A493) to extend further the time to file a petition for a writ of certiorari from January 15, 2001 to February 12, 2001, submitted to Justice Souter.
	Jan 9 2001	Application (00A493) granted by Justice Souter extending the time to file until February 12, 2001.
	Feb 12 2001	Petition for writ of certiorari filed. (Response due April 16, 2001)
	Feb 27 2001	Order extending time to file response to petition until April 16, 2001.
	Apr 16 2001	Brief of respondents American Civil Liberties Union, et al. in opposition filed.
	Apr 16 2001	Brief amicus curiae of National Law Center for Children and Families filed.
	May 1 2001	DISTRIBUTED for Conference of May 17, 2001
	May 4 2001	Reply brief of petitioner John Ashcroft, Attorney General filed.
	May 21 2001	Petition GRANTED. SET FOR ARGUMENT November 28, 2001. **********
	Jun 25 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 27 2001.
	Jun 26 2001	Brief amicus curiae of Morality in Media, Inc. filed.
	Jul 5 2001	Brief amici curiae of Raymond N. Haynes, et al. filed.
	Jul 26 2001	Brief amicus curiae of County of Dupage, Illinois filed.
	Jul 27 2001	Brief amici curiae of Members of Congress filed.
	Jul 27 2001	Brief amicus curiae of American Center for Law and Justice filed.
	Jul 27 2001	Brief of petitioner John Ashcroft, Attorney General filed.
	Jul 27 2001	Brief amicus curiae of Wallbuilders, Inc. filed.
	Jul 27 2001	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jul 30 2001	LODGING consisting of 20 sets of two large spiral bound volumes I and II,submitted by the Solicitor General.
	Jul 30 2001	LODGING consisting of twenty copies of a spiral bound volume of supplemental material submitted by the Solicitor General.
	Aug 1 2001	Time to file respondent's brief on the merits extended to and including September 20, 2001.
	Sep 7 2001	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.

No. 00-1293-CFX

Entry	Date	Proceedings and Orders
	Sep 20 2001	Brief amici curiae of American Society of Journalists and Authors, et al. filed.
	Sep 20 2001	LODGING consisting of forty copies of a CD containing the brief and copies of web sites cited in the brief amici American Society of Journalists and Authors, et al. submitted by counsel.
	Sep 20 2001	Brief of respondents American Civil Liberties Union, et al. filed.
	Sep 20 2001	Brief amici curiae of Volunteer Lawyers for the Arts, et al. filed.
	Sep 20 2001	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
	Sep 20 2001	Brief amicus curiae of Association of National Advertisers, Inc. filed.
	Sep 20 2001	Brief amicus curiae of Society for the Scientific Study of Sexuality, et al. filed.
	Sep 20 2001	Brief amicus curiae of Association of American Publishers, Inc., et al. filed.
	Sep 26 2001	CIRCULATED.
	Oct 24 2001	Reply brief of petitioner Ashcroft, Atty. Gen. filed.
	Nov 27 2001	Supplemental brief of respondents filed.
	Nov 28 2001	ARGUED.

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTION PRESENTED

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. IV 1998). COPA relies in part on "community standards" to identify material that is "harmful to minors." 47 U.S.C. 231(e)(6) (Supp. IV 1998). The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because it relies on community standards to identify material that is harmful to minors.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ a Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, Blackstripe, Addazi Inc., d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

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In the Supreme Court of the United States

No.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 217 F.3d 162. The opinion of the district court granting respondents' motion for a preliminary injunction (App., *infra*, 40a-100a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting respondents' application for a temporary restraining order (App., *infra*, 101a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2000. A petition for rehearing was denied on September 15, 2000 (App., *infra*, 124a-125a). On December 5, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 15, 2001. On January 9, 2001, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including February 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to this petition. App., *infra*, 115a-123a.

STATEMENT

1. This case involves the scope of Congress's power to protect children from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133-134. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(a) (Supp. II 1996), as well as the sending or display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d) (Supp. II 1996). The CDA provided a defense to prosecution to

persons who had "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to covered communications. 47 U.S.C. 223(e)(5) (Supp. II 1996).

In *Reno* v. *American Civil Liberties Union* (*Reno* v. *ACLU*), 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

2. Congress reexamined the problem of children's access to sexually explicit material on the Internet in light of this Court's decision in *Reno* v. *ACLU*. Both the House and the Senate conducted hearings on the subject. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998) (discussing hearings held by the Senate Committee on Commerce, Science and Transportation). Following those hearings, Congress enacted and the President signed into law the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231 (Supp. IV 1998)). In crafting COPA, Congress sought to "address[] the specific concerns raised by the Supreme Court" when it invalidated the

CDA. See H.R. Rep. No. 775, 105th Cong., 2d Sess. 12 (1998); see also S. Rep. No. 225, *supra*, at 2.

a. COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1) (Supp. IV 1998). COPA defines "material that is harmful to minors" to mean "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998) (App., *infra*, 12a). COPA's definition of nonobscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted under *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6) (Supp. IV 1998)

with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24. See H.R. Rep. No. 775, *supra*, at 13, 27-28. COPA's definition also tracks the standard that is used in state laws that prohibit the display to the public of material that is harmful to minors and that require that such material be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id.* at 13. Like those state laws, COPA is intended to shield children from material that is "clearly pornographic and inappropriate for [them]," but that is not obscene by adult standards. *Id.* at 28.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1) (Supp. IV 1998) (App., *infra*, 117a). A person can qualify for that affirmative defense by (1) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (2) "accepting a digital certificate that verifies age," or (3) "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1) (Supp. IV 1998).

b. Congress enacted legislative findings that explain the basis for COPA. 47 U.S.C. 231 note (Supp. IV 1998) (Congressional Findings). Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 1). Congress further determined that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and

educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 3). Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Supp. IV 1998) (Finding 4).

c. COPA differs from the CDA in important ways that support Congress's judgment that COPA is the least restrictive way to further the government's compelling interest in protecting children from the effects of materials that are harmful to minors.

First, the CDA applied not only to communications on the World Wide Web, but to all forms of communication on the Internet, including communications through e-mail, listservs, newsgroups, and chat rooms. *Reno* v. *ACLU*, 521 U.S. at 851. In contrast, COPA applies only to material posted on the World Wide Web. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, *supra*, at 12, 25.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, is specifically limited to material that is "patently offensive with respect to minors," and it identifies the

particular types of sexual activities the depiction, description, or representation of which is prohibited. 47 U.S.C. 231(e)(6)(B) (Supp. IV 1998).

Third, the CDA applied to large amounts of non-pornographic materials that have serious educational and other value, including any of the seven "dirty words" used in the monologue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. Indeed, the Court noted, the CDA "omit[ted] any requirement that the 'patently offensive' material covered by [the CDA] lack serious literary, artistic, political, or scientific value." *Id.* at 865. In contrast, COPA contains all three prongs of the *Ginsberg* test, and thus, by its terms, applies only to material that is designed to appeal to the "prurient interest" of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C) (Supp. IV 1998).

Fourth, the CDA defined a minor as any person under the age of 18. *Reno* v. *ACLU*, 521 U.S. at 859, 865-866. In contrast, COPA, like the state law upheld in *Ginsberg*, defines minor to mean "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. IV 1998).

Fifth, the CDA applied not only to commercial entities or transactions like the statute in *Ginsberg*, but also to all nonprofit entities and to individuals posting messages on their own computers. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to those Web communications that are made "for commercial purposes." 47 U.S.C. 231(a)(1) (Supp. IV 1998).

Sixth, the CDA made it unlawful for parents to permit their children to use the family computer to

view indecent or patently offensive material, regardless of whether the parents believed that it was appropriate for their children to obtain that material because of its value. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such prohibition. H.R. Rep. No. 775, *supra*, at 15; see also S. Rep. No. 225, *supra*, at 6.

3. The American Civil Liberties Union and several other entities and individuals (respondents) filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General of the United States, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. App., *infra*, 12a & n.13, 42a.

The district court entered a preliminary injunction preventing any enforcement of the harmful-to-minors provisions of the Act against anyone. App., *infra*, 40a-100a. Many of the court's findings and conclusions, however, support the Act's constitutionality. The court found that "[m]any of the same characteristics which make cyberspace ideal for First Amendment expression—ease of participation and diversity of content and speakers—make it a potentially harmful media for children." App., *infra*, 41a. The court explained that "[a] child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web." *Ibid.* For example, the court noted, "typing the word 'dollhouse' or 'toys' into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites," and those sites offer "free sexually explicit images and animated graphic image files." *Ibid.* The district court held that Congress has a compelling

interest in shielding children from such pornographic materials. *Id.* at 90a.

The court also found that adult identification systems are readily available that permit Web site operators to prevent children from obtaining access to harmful materials while still offering such materials to adults. App., *infra*, 71a. The court noted, for example, that Adult Check provides (at no cost to the Web site operator) a script that can be placed at any point on a Web site to which the operator wishes to prevent access by minors. *Id.* at 75a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase a Personal Identification Number (PIN) for an annual fee of $16.95, return to the original site, and use the PIN to obtain access to the site. *Id.* at 75a-76a.

The district court nonetheless held that respondents were likely to prevail in their challenge to COPA for two reasons. First, the court found that the placement of adult screens in front of materials that are harmful to children "may deter users from accessing such materials," and "the loss of users of such material may affect the speakers' economic ability to provide such communications." App., *infra*, 89a. Based on that finding, the court concluded that respondents were likely to show that COPA imposes a burden on speech that is protected for adults. *Id.* at 90a.

Second, the district court concluded that "it is not apparent" that the government "can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to [harmful-to-minors] material." App., *infra*, 93a. In the court's view, "blocking or filtering technology may be at least as successful as COPA" in restricting the access of children to harmful material.

Id. at 94a. The court acknowledged that blocking software is both over and under inclusive—it blocks some sites that are not harmful, and it allows other sites that are harmful to slip through. *Ibid.* The court also found that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device." *Id.* at 82a. The court concluded, however, that the use of blocking software may be as effective as COPA, because software blocks certain sources of harmful material that COPA does not, such as foreign sites and content outside the Web. *Ibid.*

4. The court of appeals affirmed the district court's judgment granting a preliminary injunction. App., *infra*, 1a-39a. It did so, however, on a ground upon which the district court had not relied, the parties had not briefed on appeal, and the court of appeals had raised for the first time at oral argument, *id.* at 21a, 22a n.19.

Like the district court, the court of appeals held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." App., *infra*, 20a. And unlike the district court, the court of appeals did not question the government's ability to demonstrate that COPA is the least restrictive means available to further that compelling interest. Indeed, the court of appeals specifically rejected the district court's reliance on blocking software as a less restrictive alternative. *Id.* at 15a n.16. The court of appeals also acknowledged that, in passing COPA, Congress sought to "address[] the specific concerns raised by the Supreme Court" in *Reno* v. *ACLU* in invalidating the CDA, App., *infra*, 6a (quoting H.R. Rep. No. 775, *supra*, at 12, and citing S. Rep. No. 225, *supra*, at 2), and it expressed the view that "there may be no other means by which harmful

material on the Web may be constitutionally restricted," *id.* at 3a. The court nevertheless enjoined the enforcement of COPA.

The court of appeals based its "particular determination of COPA's likely unconstitutionality * * * on COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." App., *infra*, 21a. The court stated that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a. The court further stated that COPA's reliance on community standards affects the constitutionality of "the entire COPA statute." *Id.* at 21a. The court could "see no means by which to excise those 'unconstitutional' elements of the statute from those that are constitutional." *Id.* at 33a.

The court of appeals noted that in *Reno* v. *ACLU*, this Court, in identifying various features of the CDA that contributed to its breadth of coverage, had pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." See App., *infra*, 22a (quoting 521 U.S. at 577-578). In that light, the court found it significant that "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users." *Id.* at 24a. As a result, the court reasoned, "to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a

verification system." *Id.* at 24a-25a. If Web publishers were to choose to place their harmful material behind screens, the court explained, it "would prevent access to protected material by any adult * * * without the necessary age verification credentials," and it "would completely bar access to those materials to all minors * * * even if the material would not otherwise have been deemed 'harmful' to them in their respective geographic communities." *Id.* at 25a. Based on those considerations, the court concluded that COPA "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

The court of appeals acknowledged that in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California* v. *FCC*, 492 U.S. 115 (1989), this Court upheld the application of varying community standards to persons whose commercial conduct had effects in different geographic areas. App., *infra*, 25a-26a. The court of appeals distinguished those cases, however, on the ground that the parties involved "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." *Id.* at 26a.

The government's petition for rehearing and rehearing en banc was denied. App., *infra*, 124a-125a. Judge Alito voted in favor of rehearing en banc. *Id.* at 125a.

REASONS FOR GRANTING THE PETITION

The court of appeals, relying on an argument not addressed by the district court or made by the parties on appeal, held that COPA's reliance on community standards to identify material that is harmful to minors "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." App., *infra*, 21a. The court's decision prevents the government from enforcing COPA against anyone under any circumstances, and the court was further of the view that there may be no constitutional means to protect children from the harmful effects of the voluminous amount of pornographic material on the World Wide Web. *Id.* at 3a. The court of appeals thus has gravely—indeed, in its own view, perhaps fatally—constricted Congress's power to address that serious problem. The court of appeals' holding is also incorrect. The court's decision is based on a misreading of this Court's decision in *Reno* v. *ACLU*, 521 U.S. 844 (1997), and it conflicts with decisions of this Court that have upheld the application of community standards to determine whether material appeals to the prurient interest and is patently offensive. Review by this Court is therefore warranted.

A. COPA makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. IV 1998). Material is harmful to minors if it (1) is designed to appeal to the "prurient interest" of minors, (2) depicts sexual activity or specified parts of the anatomy in a manner that is "patently offensive" with respect to minors, and (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. IV 1998). COPA relies on community standards to determine whether material appeals to the "prurient interest" of minors

and is "patently offensive" with respect to minors. 47 U.S.C. 231(e)(6) (Supp. IV 1998).[1]

The court of appeals held that COPA's reliance on community standards to identify material that is harmful to minors "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." App., *infra*, 21a. The court flatly stated that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a. The court also stated, without qualification, that COPA's use of community standards leads to a "result [that] imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

As relief, the court of appeals did not simply enjoin the use of community standards under COPA. The court enjoined the enforcement of COPA across the

[1] COPA's definition of material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted under *Miller* v. *California*, 413 U.S. 15 (1973), including *Miller*'s approval of the use of "community standards" to determine whether material appeals to the "prurient interest" and is "patently offensive." Compare 47 U.S.C. 231(e)(6) (Supp. IV 1998) with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24, 30. Although the text of the standard approved in *Miller* uses the phrase "community standards" in describing the "prurient interest" inquiry, *id.* at 24, *Miller* makes clear that community standards also apply to the inquiry into whether material is "patently offensive," *id.* at 30. Congress intended to incorporate that aspect of *Miller*. See H.R. Rep. No. 775, *supra*, at 13, 27.

board, concluding that COPA's reliance on community standards affects the constitutionality of "the entire COPA statute." App., *infra*, 21a. In the court's view, the use of community standards to identify material that is harmful to minors "is an integral part of the statute, permeating and influencing the whole of the statute," and the court could "see no means by which to excise those 'unconstitutional' elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional)." *Id.* at 33a. Moreover, as the court saw it, "there may be no other means by which harmful material on the Web may be constitutionally restricted." *Id.* at 3a. The court therefore apparently was prepared to leave Congress no room to assert its authority to protect children from pornographic material on the Web.

The court of appeals' decision is therefore dramatic and extraordinary in its scope. The decision prevents the government from enforcing a recent Act of Congress against anyone under any circumstances, and it suggests that there may be no constitutional means to protect children from the harmful effects of the voluminous amount of pornographic material on the World Wide Web. The court of appeals' decision therefore clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

B. Review is also warranted because the court of appeals erred in its First Amendment analysis of COPA's reliance on community standards. The court of appeals premised its constitutional ruling on a finding that "Web publishers are without any means to limit access to their sites based on the geographic location of

particular Internet users." App., *infra*, 24a. As a result, the court reasoned, "to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system." *Id.* at 24a-25a. In the court's view, under this Court's decision in *Reno* v. *ACLU*, *id.* at 22a, that consequence "imposes an overreaching burden and restriction on constitutionally protected speech," *id.* at 29a.

1. The court of appeals' reading of *Reno* v. *ACLU* is incorrect. The sentence in *Reno* v. *ACLU* discussing community standards, on which the court of appeals relied, was part of a two-paragraph discussion in which the Court noted that "[t]he breadth of the CDA's coverage is wholly unprecedented." 521 U.S. at 877. In that discussion, the Court identified as factors contributing to the CDA's breadth that it was "not limited to commercial speech or commercial entities," but rather applied to "all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors"; that the terms "indecent" and "patently offensive" used in the CDA were undefined and covered "large amounts of non-pornographic material with serious educational or other value"; and that the CDA criminalized parental decisions to allow children to view covered material. *Id.* at 877-878. It was in connection with the second of those features that the Court pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of

the community most likely to be offended by the message." *Ibid.*

The Court did not suggest that the breadth of the CDA rendered it per se unconstitutional, much less that the CDA's reliance on community standards was per se unconstitutional. Instead, the Court held that "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." 521 U.S. at 879. The Court then invalidated the CDA because the government failed to satisfy that burden. *Ibid.*

The court of appeals' reliance on *Reno* v. *ACLU* is misplaced for two reasons. First, the use of a community standards criterion was only one of several factors that cumulatively led the Court in *Reno* v. *ACLU* to place an especially heavy burden of justification on the government, and *none* of the other factors is present here. Unlike the CDA, COPA defines the covered material as that which is both designed to appeal to the "prurient interest" and is "patently offensive" "with respect to minors"; it enumerates the particular sexual activities that are within its scope; it applies only to communications made for commercial purposes; it expressly does not cover material that has "serious literary, artistic, political, or scientific value" for minors; and it does not penalize the decisions of parents to permit their children to view "harmful" material. Because COPA is carefully limited in scope—and because under COPA reliance on community standards is itself limited to determining what adults would conclude appeals to the prurient interest and is patently offensive specifically "with respect to minors" —COPA's reliance on community standards is quite different from that in the CDA. COPA therefore does

not trigger any burden of justification beyond the one that applies to other content-based restrictions.

Second, even if we assume that COPA's reliance on community standards raises the same concerns as all the factors together raised in *Reno* v. *ACLU*, COPA's reliance on community standards at most places "an especially heavy burden" on the government to show that COPA is the least restrictive alternative. 521 U.S. at 879. Rather than proceeding to that step in the analysis, however, the court of appeals instead held that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." App., *infra*, 3a. That error had dramatic consequences, because the court of appeals did not find that the government failed to show that COPA is the least restrictive alternative available to protect children from harmful material on the Web. To the contrary, the court of appeals specifically rejected the district court's reliance on blocking software as a less restrictive alternative, *id.* at 15a n.16, 38a n.24, and it expressed the view that "there may be no other means by which harmful material on the Web may be constitutionally restricted," *id.* at 3a. *Reno* v. *ACLU* therefore provides no support for the court of appeals' decision invalidating COPA.

2. The court of appeals' decision regarding COPA's reliance on community standards also conflicts with this Court's decisions in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). In *Hamling*, the Court rejected the contention that a federal statute that makes it unlawful to use the mail to distribute obscene publications must incorporate a single national standard of obscenity. The Court stated that "[t]he fact

that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." 418 U.S. at 106.

In *Sable*, the Court upheld the constitutionality of a federal prohibition against obscene "dial-a-porn" telephone messages. The Court rejected the contention that the dial-a-porn ban is unconstitutional because "it places message senders in a 'double bind' by compelling them to tailor all their messages to the least tolerant community." 492 U.S. at 124. The Court held that "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others." *Id.* at 125-126. The Court explained that "[i]f Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 126.

The court of appeals sought to distinguish *Hamling* and *Sable* on the ground that the parties involved in those cases "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." App., *infra*, 26a. The Court's analysis in *Hamling* and *Sable*, however, did not depend on that fortuity. Instead, the controlling principle that emerges from *Hamling* and *Sable* is that a person whose commercial conduct has effects in more than one community has the responsibility to ensure that those effects are lawful in each of the affected communities. That principle applies as

much to a commercial pornographer on the World Wide Web as to the parties involved in *Hamling* and *Sable*.

When persons post material on the Web, they make it "available, simultaneously, to all communities in the world where a computer can be plugged in." H.R. Rep. No. 775, *supra*, at 28. Web publishers who make communications for commercial purposes also obtain the benefits of a nationwide market for their products. Under *Hamling* and *Sable*, there is "no constitutional barrier" to placing the responsibility upon such publishers to make sure that their communications are not harmful to children in the communities that those communications reach. *Sable*, 492 U.S. at 125-126. "If [such a publisher's] audience is comprised of different communities with different local standards, [that publisher] ultimately bears the burden of complying with the [restrictions] on [harmful-to-minors] messages." *Id.* at 126.

3. The court of appeals' constitutional analysis also fails to give sufficient weight to the features of COPA that make its reliance on community standards particularly unproblematic.

a. First, Congress expressly found that COPA's harmful to minors standard is "one that is reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28. The court of appeals rejected Congress's judgment based on this Court's statement in *Miller* that communities throughout the United States may vary in their views on what material is obscene for adults. App., *infra*, 32a. The court erred in relying on that statement. Even if the average adult in a particular State or locality might feel that adults should have relatively free access to pornographic material, there is no reason to believe that those same adults would want

children in the State or locality to be exposed to such material. For similar reasons, there is every reason to expect a far greater degree of agreement from community to community with respect to what adults believe is suitable for children on a nationwide and readily accessible medium like the Internet. Moreover, whatever divergence might exist at the margins, Congress had an ample basis for concluding that there would be no significant geographical divergence on the question whether children should have access to the numerous sites that freely display the equivalent of Penthouse centerfolds as teasers to entice the purchase of other more graphic material.

b. COPA also establishes firm limits on the kinds of material that can be viewed as "harmful to minors," thereby confining any potential divergence among communities to a narrow band of material. By its terms, COPA applies only to material that, taken as a whole, has no "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(C) (Supp. IV 1998). In the obscenity context, this Court has held that community standards do not apply in deciding whether material has serious value. *Pope* v. *Illinois*, 481 U.S. 497, 500-501 (1987). Instead, the question is whether "a reasonable person would find such value in the material, taken as a whole." *Id.* at 501. Congress intended for that same approach to be followed in deciding whether material has serious value for children. H.R. Rep. No. 775, *supra*, at 27-28.

The serious value prong "allows appellate courts to impose some limitations and regularity * * * by setting, as a matter of law, a national floor for socially redeeming value." *Reno* v. *ACLU*, 521 U.S. at 873. The existence of that prong of the inquiry also undermines the court of appeals' assumption that COPA requires

Web publishers to place "vast amounts of material" behind age verification screens, App., *infra*, 25a, except to the extent that the court of appeals was referring to the obligations of commercial purveyors of what is truly pornographic for minors. Compare *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988) (finding, upon certification following this Court's decision in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1998), that none of the 16 books that the plaintiff booksellers submitted as perhaps covered by the harmful-to-minors standard in the Virginia display law lacked serious literary, artistic, political, or scientific value).

Moreover, just as this Court held in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), that the First Amendment imposes "substantive constitutional limitations," enforceable by a reviewing court, on what a jury may find to be "patently offensive" for adults, see *id.* at 159-161, a reviewing court may also enforce substantive limitations on what may be found to be "patently offensive" with respect to minors. The harmful-to-minors test was intended to capture material that is "clearly pornographic and inappropriate for minor children." H.R. Rep. No. 775, *supra*, at 28. Congress did not intend to permit communities to treat as patently offensive "entertainment, library, or news materials that merely contain nudity or sexual information." *Ibid.* That limitation adds important additional protection against significant geographic variations in what may be found harmful to minors.

c. To the extent that there remains some meaningful degree of divergence among communities concerning what material is harmful to minors, a commercial Web publisher can easily comply with COPA by placing behind an age verification screen any material that

appears to satisfy all three prongs of the statutory definition. That is the approach a commercial Web publisher would be likely to follow even if it had to comply with the standards of a single community. The placement of material behind adult verification screens that reasonably appears designed to appeal to the prurient interest of minors, depicts sexual activity or certain parts of the anatomy in a manner that is patently offensive with respect to minors, and lacks any serious value for minors, does not impose an unconstitutional burden on adult access to such material.

The district court found that adult verification services would provide personal identification numbers (PINs) to adults for $16.95 a year, and would furnish Web site operators with the software necessary to screen for such numbers at no cost. App., *infra*, 75a-76a. And the court of appeals even identified a Web service that will provide a person who has a valid credit card an adult PIN "without cost." *Id.* at 14a n.15 (citing www.freecheck.com). But whether an adult PIN costs $16.95 per year or is free, it is not an unacceptable price to pay for protecting children from the harmful effects of graphic pornographic images.

d. By requiring the placement of material covered by the Act behind age verification screens, COPA in effect directs "the commercial pornographer to put sexually explicit images 'behind the counter.'" H.R. Rep. No. 775, *supra*, at 15. COPA therefore requires nothing more than what state "blinder rack," "sealed wrapper," "opaque cover," and other display laws require in the world outside cyberspace. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). Despite claims that such laws impose an unconstitutional burden on adult access to protected speech, those laws have been repeatedly upheld. See,

e.g., *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389, 1399 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281, 1289 (10th Cir. 1983). There is no basis for reaching a different conclusion here.

C. No further proceedings in the lower courts are needed to clarify the question presented or to render that question suitable for resolution by this Court. As previously noted, the court of appeals held that COPA's reliance on community standards leads inexorably to the conclusion, here and now, that the Attorney General must be enjoined on First Amendment grounds from enforcing COPA against anyone. No further proceedings in the district court are needed for this Court to resolve that legal issue at this stage.

Moreover, the government has been subject for some time to a nationwide preliminary injunction that prevents it from enforcing COPA against anyone.[2] Given the nature of the court of appeals' decision affirming that preliminary injunction based on its view of community standards, and the denial of en banc review, there is every reason to expect that further proceedings in the district court would simply result in a

[2] The district court rejected the government's contention that any injunction should be limited to barring enforcement of the Act against the parties who brought this action. App., *infra*, 109a-110a n.8. But see *United States Department of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (staying injunction insofar as it granted relief to persons other than plaintiff).

permanent injunction of a similarly wide scope on the same ground, and an affirmance of that injunction by the court of appeals. The result would be simply to delay this Court's resolution of the important question presented concerning Congress's ability to rely on community standards in determining whether material appeals to the prurient interest and is patently offensive with respect to minors. That result would only exacerbate the adverse consequences of the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION;
ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT
LIGHT BOOKSTORES; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;
ADDAZI INC. D/B/A CONDOMANIA;
ELECTRONIC FRONTIER FOUNDATION;
ELECTRONIC PRIVACY INFORMATION CENTER;
FREE SPEECH MEDIA; INTERNET CONTENT
COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;
POWELL'S BOOKSTORE; RIOTGRRL;
SALON INTERNET, INC.; WEST STOCK, INC.;
PLANETOUT CORPORATION

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

[Argued: Nov. 4, 1999
Opinion filed: June 22, 2000]

Before: NYGAARD, MCKEE Circuit Judges and
GARTH, Senior Circuit Judge

OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal "presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of minors." *American Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990). The government challenges the District Court's issuance of a preliminary injunction which prevents the enforcement of the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231) ("COPA"), enacted in October of 1998. At issue is COPA's constitutionality, a statute designed to protect minors from "harmful material" measured by "contemporary community standards" knowingly posted on the World Wide Web ("Web") for commercial purposes.[1]

We will affirm the District Court's grant of a preliminary injunction because we are confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits. Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web

[1] The District Court exercised subject matter jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 1331. This court exercises appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which provides a court of appeals with jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions . . . except where a direct review may be had in the Supreme Court."

publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.

In affirming the District Court, we are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

I. BACKGROUND

COPA was enacted into law on October 21, 1998. Commercial Web publishers subject to the statute that distribute material that is harmful to minors are required under COPA to ensure that minors do not access the harmful material on their Web site. COPA is Congress's second attempt to regulate the dissemination to minors of indecent material on the Web/Internet. The Supreme Court had earlier, on First Amendment grounds, struck down Congress's first endeavor, the Communications Decency Act, ("CDA")

which it passed as part of the Telecommunications Act of 1996.[2] *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno II*"). To best understand the current challenge to COPA, it is necessary for us to briefly examine the CDA.

A. CDA

The CDA prohibited Internet users from using the Internet to communicate material that, under contemporary community standards, would be deemed patently offensive to minors under the age of eighteen. *See Reno II*, 521 U.S. at 859-60, 117 S. Ct. 2329.[3] In so

[2] For ease of reference the various applicable cases will be referred to as follows: *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), hereinafter "*Reno I*" (addressing CDA); *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997), hereinafter "*Reno II*" (striking down the CDA as unconstitutional); *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999), hereinafter "*Reno III*" (case currently on appeal addressing constitutionality of COPA).

[3] The Communications Decency Act, 47 U.S.C. § 223(d) provides that:

> Whoever—
>
> "(1) in interstate or foreign communications knowingly—"
>
> "(A) uses an interactive computer service to send a specific person or persons under 18 years of age, or"
>
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or' "
>
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity"
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

restricting Internet users, the CDA provided two affirmative defenses to prosecution; (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors. *See id.* at 860, 117 S. Ct. 2329. In holding that the CDA violated the First Amendment, the Supreme Court explained that without defining key terms the statute was unconstitutionally vague. Moreover, the Court noted that the breadth of the CDA was "wholly unprecedented" in that, for example, it was "not limited to commercial speech or commercial entities . . . [but rather] [i]ts open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers." *Id.* at 877, 117 S. Ct. 2329.

Further, the Court explained that, as applied to the Internet, a community standards criterion would effectively mean that because all Internet communication is made available to a worldwide audience, the content of the conveyed message will be judged by the standards of the community most likely to be offended by the content. *See id.* at 877-78. Finally, with respect to the affirmative defenses authorized by the CDA, the Court concluded that such defenses would not be economically feasible for most noncommercial Web publishers, and that even with respect to commercial publishers, the technology had yet to be proven effective in shielding

minors from harmful material. *See id.* at 881. As a result, the Court held that the CDA was not tailored so narrowly as to achieve the government's compelling interest in protecting minors, and that it lacked the precision that the First Amendment requires when a statute regulates the content of speech. *See id.* at 874. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (U.S. 2000).

B. COPA

COPA, the present statute, attempts to "address[ ] the specific concerns raised by the Supreme Court" in invalidating the CDA. H.R. REP. NO. 105-775 at 12 (1998); *See* S.R. REP. NO. 105-225, at 2 (1998). COPA prohibits an individual or entity from:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.

47 U.S.C. § 231(a)(1) (emphasis added). As part of its attempt to cure the constitutional defects found in the CDA, Congress sought to define most of COPA's key terms. COPA attempts, for example, to restrict its scope to material on the Web rather than on the Internet as a whole;[4] to target only those Web communications made for "commercial purposes";[5] and to limit its scope to only that material deemed "harmful to minors."

[4] COPA defines the clause "by means of the World Wide Web" as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." 47 U.S.C. § 231(e)(1).

Under COPA, whether material published on the Web is "harmful to minors" is governed by a three-part test, *each* of which must be found before liability can attach:[6]

> (A) the average person, applying *contemporary community standards*, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

[5] COPA defines the clause "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, COPA defines a person "engaged in the business" as one

> who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

Id. § 231(e)(2)(B).

[6] In the House Report that accompanied the bill that eventually became COPA, this "harmful to minors" test attempts to conform to the standards identified by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), as modified by *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) in identifying "patently offensive" material. *See* H.R. REP. NO. 105-775, at 13 (1998).

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious, literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6) (emphasis added).[7] The parties conceded at oral argument that this "contemporary community standards" test applies to those communities within the United States, and not to foreign communities. Therefore, the more liberal community standards of Amsterdam or the more restrictive community standards of Tehran would not impact upon the analysis of whether material is "harmful to minors" under COPA.

COPA also provides Web publishers subject to the statute with affirmative defenses. If a Web publisher "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number . . . a digital certificate that verifies age . . . or by any other reasonable measures that are feasible under available technology," then no liability will attach to the Web publisher even if a minor should nevertheless gain access to restricted material

[7] Under COPA, a minor is defined as one under age seventeen. *See* 47 U.S.C. § 231(e)(7).

under COPA. 47 U.S.C. § 231(c)(1).[8] COPA violators face both criminal (maximum fines of $50,000 and a maximum prison term of six months, or both) and civil (fines of up to $50,000 for each day of violation) penalties.[9]

C. Overview of the Internet and the World Wide Web

In recent years use of the Internet and the Web has become increasingly common in mainstream society. Nevertheless, because the unique character of these new electronic media significantly affect our opinion today, we briefly review their relevant elements.[10]

The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world, and is capable of quickly transmitting communications. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997); *ACLU v. Reno*, 31 F. Supp.2d 473, 481 (E.D. Pa. 1999) ("*Reno III*"). Even though the Internet appears to be a "single, integrated system" from a user's perspective, in fact no single organization or entity controls the Internet. *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D.

[8] The defense also applies if an individual or entity attempts "in good faith to implement a defense" listed above. *See id.* 47 U.S.C. § 231(c)(2).

[9] An individual found to have intentionally violated COPA also faces an additional fine of not more than $50,000 for each day of violation. *See* 47 U.S.C. § 231(a)(2).

[10] For more thorough descriptions of the Internet and the Web *see e.g.*, *Reno I*, 929 F. Supp. 824, 830-45; *Reno II*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874; *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164-67 (S.D.N.Y. 1997); *Hearst Corp. v. Goldberger*, 1997 WL 97097 *1 (S.D.N.Y. Feb. 26, 1997) (citing cases).

Pa. 1996) ("*Reno I*"); *Reno III*, 31 F. Supp.2d at 484. As a result, there is no "centralized point from which individual Web sites or services can be blocked from the Web." *Id.* Although estimates are difficult because of the Internet's rapid growth, it was recently estimated that the Internet connects over 159 countries and more than 109 million users. *See ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999).

The World Wide Web is a publishing forum consisting of millions of individual "Web sites" each containing information such as text, images, illustrations, video, animation or sounds provided by that site's creator. *See American Libraries*, 969 F. Supp. at 166. Some of these Web sites contain sexually explicit material. *See Reno III*, 31 F. Supp.2d at 484. As a publishing forum, the Web is the best known method of communicating information online. *See id.* Information is said to be published on the Web as soon as it is made available to others by connecting the publisher's computer to the Internet. *See Reno I*, 929 F. Supp. at 844; *Reno III*, 31 F. Supp.2d at 483. Each site is connected to the Internet by means of certain protocols that permit "the information to become part of a single body of knowledge accessible by all Web visitors." *American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483.[11] As a part of this unified body of knowledge,

[11] A user who wishes to access the Web resources employs a "browser." Browser software—such as Netscape Navigator, Mosaic, or Internet Explorer—enables the user to display, print, and download documents that are formatted in the standard Web formatting language. *See American Libraries*, 969 F. Supp. at 166. The Web "uses a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound,

Web pages are all linked together so that the Internet user can freely move from one Web page to another by "clicking" on a "link." *See id.* Because the Internet has an "international, geographically-borderless nature,"[12] with the proper software every Web site is accessible to all other Internet users worldwide. *See American Libraries*, 969 F. Supp. at 166; *Reno I*, 929 F. Supp. at 837; *Reno III*, 31 F. Supp.2d at 483-84. Indeed, the Internet "negates geometry . . . it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The [Internet] is ambient—nowhere in particular and everywhere at once." *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951, 956 (1998).

It is essential to note that under *current* technology, Web publishers cannot "prevent [their site's] content from entering any geographic community." *Reno III*, 31 F. Supp.2d at 484. As such, Web publishers cannot prevent Internet users in certain geographic locales from accessing their site; and in fact the Web publisher will not even know the geographic location of visitors to its site. *See American Libraries*, 969 F. Supp. at 171. Similarly, a Web publisher cannot modify the content of its site so as to restrict different geographic commun-

animation and moving video stored in many other formats. . . . [Hyperlinks] allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world." *Reno III*, 31 F. Supp.2d at 483.

[12] *People v. Barrows*, 177 Misc.2d 712, 729, 677 N.Y.S.2d 672 (N.Y. 1998)

ities to access of only certain portions of their site. Thus, once published on the Web, existing technology does not permit the published material to be restricted to particular states or jurisdictions.

D. Procedural History

On October 22, 1998, the day after COPA was enacted, the American Civil Liberties Union ("ACLU") brought the present action in the United States District Court for the Eastern District of Pennsylvania, challenging COPA's constitutionality and seeking to enjoin its enforcement.[13] After granting a temporary restraining order against enforcement of the law on November 20, 1998, the District Court held extensive evidentiary hearings which, on February 1, 1999, resulted in the entry of a preliminary injunction preventing the government from enforcing COPA.

E. District Court's Findings of Fact

After five days of testimony, the District Court rendered sixty-seven separate findings of fact concerning the Internet, the Web, and COPA's impact on speech activity in this relatively-new medium. *See Reno III*, 31 F. Supp.2d at 482-92. It bears noting that none of the parties dispute the District Court's findings (including those describing the Internet and the Web), nor are any challenged as clearly erroneous. Thus, we accept these findings.

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[13] Other parties joined the ACLU in asserting the unconstitutionality of COPA. For ease of reference, we will refer to all party-plaintiffs as "ACLU" throughout this opinion.

The District Court first rendered findings concerning the physical medium known as the Internet, which it recognized consisted of many different methods of communication, only one of which is the World Wide Web. *See Reno III*, 31 F. Supp.2d at 482-83. It found that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographical community." *Id.*

The Court then made findings as to the costs and burdens COPA imposes on Web publishers and on the adults who seek access to sites covered by COPA. *See Reno III*, 31 F. Supp.2d at 482-492. As observed earlier, the statute provides for a limited number of defenses for Web publishers. *See* 47 U.S.C. § 231(c).[14] The Court found that as a technological matter the only affirmative defenses presently available are the implementation of credit card or age verification systems because there is no currently functional digital certificate or other reasonable means to verify age. *See Reno III*, 31 F. Supp.2d at 487.

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[14] The statute provides:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors–
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number,
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

See 47 U.S.C. § 231(c).

With respect to the credit card option, the court found that the cost to Web publishers could range from $300 to "thousands of dollars" (exclusive of transaction fees incurred from each verification). *Id.* at 488. These costs were also exclusive, according to the court, of the labor and energy that would be required of the Web publisher to implement such a system. *Id.* This labor and energy would include reorganizing a particular Web site to ensure that material considered "harmful to minors" could only be accessed after passing through a credit card or other age verification system. *See id.* at 490. With this in mind, the court found, for example, that textual material that consisted primarily of non-sexual material, but also included some content that was "harmful to minors" would also be subject to such age verification systems. *See id.*

As for age verification systems, the District Court's findings were more optimistic. The court found that a Web publisher "can sign up for free with Adult Check [one company providing such a service] to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by [their] users." *Id.* at 489. The District Court also downplayed the cost (both in price and in energy) that would be incurred by the individual seeking to access "harmful to minors" material on the Web, finding that an Adult Check password could be easily purchased for only $16.95. *See id.* at 490.[15] The same burdens concerning the reorganization of a particular Web site mentioned above would, of course, equally apply to a

[15] It now seems that those with a valid credit card who wish to acquire an adult PIN may do so without cost using a Web service such as www.freecheck.com.

Web publisher that elected to utilize a PIN number for age verification.

Either system, according to the District Court, would impose significant residual or indirect burdens upon Web publishers. Most importantly, both credit card and age verification systems require an individual seeking to access material otherwise permissible to adults to reveal personal statistics. Because many adults will choose not to reveal these personal details, those otherwise frequently visited Web sites will experience "a loss of traffic." *Id.* at 491. This loss of traffic, in turn, would inflict "economic harm" upon the particular Web site, thus increasing the burden that COPA imposes. *Id.* ¶ 61.

Finally, the District Court considered whether voluntary parental blocking or filtering software was a less restrictive means by which to achieve the government's compelling objective of protecting minors from harmful material on the Web. The court found that "[s]uch technology may be downloaded and installed on a user's home computer at a price of approximately $40.00." *Id.* at 492 ¶ 65. The court, however, acknowledged that such software "is not perfect" as it is both over and under inclusive in the breadth of the material that it blocks and filters. *See id.* ¶ 66.[16]

[16] We question, however, the effectiveness of actions taken by a minor's parent to supervise or block harmful material by using filtering software. We are of the view that such actions do not constitute government action, and we do not consider this to be a lesser restrictive means for the government to achieve its compelling interest. *See also* n. 24 *supra*. *But see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000).

F. District Court's Conclusions of Law

Initially, the government moved the District Court to dismiss the ACLU's action insofar as the individuals and entities that it purported to represent were not in danger of prosecution under COPA and therefore lacked standing. In particular, the government asserted that the material placed on plaintiffs' Web sites was not "harmful to minors" and that each of the plaintiffs were not "engaged in the business" of posting such material for "commercial purposes." *See supra* note 13.

The District Court interpreted COPA to impose liability on those Web publishers who profited from Web sites that contained some, even though not all, material that was harmful to minors. *See Reno III*, 31 F. Supp.2d at 480. The court therefore concluded that the plaintiffs could reasonably fear prosecution because their Web sites contained material "that is sexual in nature." *Id.*

Having established plaintiffs' standing[17]—an analysis with which we agree—the District Court began its First Amendment analysis by stating that insofar as COPA prohibits Web publishers from posting material that is "harmful to minors," it constitutes a content-based restriction on speech that "is presumptively invalid and is subject to strict scrutiny." *Id.* at 493 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable Comm. of Calif. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989)) *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct.

[17] *See Reno III*, 31 F. Supp.2d at 479.

1878, 146 L.Ed.2d 865 (2000). Pursuant to this strict scrutiny analysis, the District Court held that COPA placed too large a burden on protected expression. In particular, the court found that the high economic costs that Web publishers would incur in implementing an age verification system would cause them to cease publishing such material, and further, that the difficulty in accurately shielding harmful material from minors would lead Web publishers to censor more material than necessary. *See id.* at 494-95. Moreover, the District Court believed that because of the need to use age verification systems, adults would be deterred from accessing these sites, and that the resulting loss of Web traffic would affect the Web publishers' abilities to continue providing such communications in the future.

The court then considered whether the government could establish that COPA was the least restrictive and most narrowly tailored means to achieve its compelling objective. *See Reno III*, 31 F. Supp.2d at 496. The government contends that COPA meets this test because COPA does not " 'ban . . . the distribution or display of material harmful to minors [but] simply requires the sellers of such material to recast their message so that they are not readily available to children.' "Appellant's Brief at 27 (quoting H.R. REP. NO. 105-775 at 6 (1998)). The court concluded, however, that even if COPA were enforced, children would still be able to access numerous foreign Web sites containing harmful material; that some minors legitimately possess credit cards—thus defeating the effectiveness of this affirmative defense in restricting access by minors; that COPA prohibits a "sweeping category of form of content" instead of limiting its coverage to pictures, images and graphic image files—most often

utilized by the adult industry as "teasers" *Reno III*, 31 F. Supp.2d at 497; and that parental blocking and filtering technology would likely be as effective as COPA while imposing fewer constitutional burdens on free speech. Therefore, the District Court concluded that COPA was not the least restrictive means for the government to achieve its compelling objective of protecting minors from harmful material. *Id.* at 492. As a result, the court held that the ACLU had shown a substantial likelihood of succeeding on the merits in establishing COPA's unconstitutionality.

In concluding its analysis, the District Court held that losing First Amendment freedoms, even if only for a moment, constitutes irreparable harm. *See id.* (citing *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)). And, in balancing the interests at stake for issuing a preliminary injunction, the District Court concluded that the scale tipped in favor of the ACLU, as the government lacks an interest in enforcing an unconstitutional law. *See id.* (citing *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996)). Because the ACLU met its burden for a preliminary injunction, the District Court granted its petition.

II. ANALYSIS

In determining whether a preliminary injunction is warranted, we must consider:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (citing *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc)). We review a district court's grant of a preliminary injunction according to a three-part standard. Legal conclusions are reviewed de novo, findings of fact are reviewed for clear error, and the "ultimate decision to grant or deny the preliminary injunction" is reviewed for abuse of discretion. *See Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S. Ct. 1802, 143 L.Ed.2d 1007 (1999).

A. Reasonable probability of success on the merits

We begin our analysis by considering what, for this case, is the most significant prong of the preliminary injunction test—whether the ACLU met its burden of establishing a reasonable probability of succeeding on the merits in proving that COPA trenches upon the First Amendment to the United States Constitution. Initially, we note that the District Court correctly determined that as a content-based restriction on speech, COPA is "both presumptively invalid and subject to strict scrutiny analysis." *See Reno III*, 31 F. Supp.2d at 493. As in all areas of constitutional strict scrutiny jurisprudence, the government must establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech. *See, e.g., Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *Sable Comm of Calif. v. FCC*, 492

U.S. 115, 126, 109 S. Ct. 2829 (1989).[18] These principles have been emphasized again in the Supreme Court's most recent opinion, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S Ct. 1878, 146 L.Ed.2d 865 (2000), where the Court, concerned with the "bleeding" of cable transmissions, held § 505 of the Telecommunications Act of 1996 unconstitutional as violative of the First Amendment.

It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards. *See Reno III*, 31 F. Supp.2d at 495 (citing

[18] The Supreme Court has recognized that each medium of expression may permit special justifications for regulation. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). For example, broadcast media, due to the history of extensive government regulation, its "invasive" nature, and the scarcity of available frequencies at its inception justified heightened regulation. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000). However, the Supreme Court has also recognized that these same elements, which justified heightened regulation of the broadcast medium, do not exist in cyberspace. *See Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). The Internet has not been historically subject to regulation. Nor has the Internet suffered from a scarcity of available frequencies. *See id.* at 869-70, 117 S. Ct. 2329. Therefore, the Supreme Court held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this [cyberspace] medium." *Id.* at 870, 117 S. Ct. 2329.

Sable, 492 U.S. at 126, 109 S. Ct. 2829 (1989); *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). At issue is whether, in achieving this compelling objective, Congress has articulated a constitutionally permissible means to achieve its objective without curtailing the protected free speech rights of adults. *See Reno III*, 31 F. Supp.2d at 492 (citing *Sable*, 492 U.S. at 127, 109 S. Ct. 2829; *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957)). As we have observed, the District Court found that it had not—holding that COPA was not likely to succeed in surviving strict scrutiny analysis.

We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute. Hence we base our opinion entirely on the basis of the likely unconstitutionality of this clause, even though the District Court relied on numerous other grounds.[19]

[19] As a result, we do not find it necessary to address the District Court's analysis of the definition of "commercial purposes"; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included

As previously noted, in passing COPA, Congress attempted to resolve all of the problems raised by the Supreme Court in striking down the CDA as unconstitutional. One concern noted by the Supreme Court was that, as a part of the wholly unprecedented broad coverage of the CDA, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. We are not persuaded that the Supreme Court's concern with respect to the "community standards" criterion has been sufficiently remedied by Congress in COPA.

Previously, in addressing the mailing of unsolicited sexually explicit material in violation of a California obscenity statute, the Supreme Court held that the fact-finder must determine whether "'the average person, applying contemporary community standards' would find the work taken as a whole, [to appeal] to the prurient interest." *Miller v. California*, 413 U.S. 15, 24,

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as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken "as a whole" should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic.

We recognize that in focusing on the "contemporary community standards" aspect of COPA we are affirming the District Court's ruling on a ground other than that emphasized by the District Court. *See PAAC v. Rizzo*, 502 F.2d 306, 308 n. 1 (1974).

93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230, 92 S. Ct. 2245, 33 L.Ed.2d 312 (1972)). In response to the Supreme Court's criticism of the CDA, Congress incorporated into COPA this *Miller* test, explaining that in so doing COPA now "conforms to the standards identified in *Ginsberg*, as modified by the Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973)." H.R. REP. NO. 105-775 at 13 (1998); 47 U.S.C. § 231(e)(6)(A). Even in so doing, Congress remained cognizant of the fact that "the application of community standards in the context of the Web is controversial." H.R. REP. NO.. 107-775, at 28. Nevertheless, in defending the constitutionality of COPA's use of the *Miller* test, the government insists that "there is nothing dispositive about the fact that [in COPA] commercial distribution of such [harmful] materials occurs through an online, rather than a brick and mortar outlet." *See* Reply Brief at 18 n. 3.

Despite the government's assertion, "[e]ach medium of expression 'must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'" *Reno III*, 31 F. Supp.2d at 495 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975)). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at ——, 120 S. Ct. 1878, 1887, 146 L.Ed.2d 865, at _____ (2000). In considering "the unique factors that affect communication in the new and technology-laden medium of the Web," we are convinced that there are crucial differences between a "brick and mortar outlet" and the online Web that dramatically affect a First Amendment analysis. *Id.*

Unlike a "brick and mortar outlet" with a specific geographic locale, and unlike the voluntary physical mailing of material from one geographic location to another, as in Miller, the uncontroverted facts indicate that the Web is *not geographically constrained. See Reno III*, 31 F. Supp.2d at 482-92; *American Libraries*, 969 F. Supp. at 169 ("geography, however, is a virtually meaningless construct on the Internet"). Indeed, and of extreme significance, is the fact, as found by the District Court, that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. As soon as information is published on a Web site, it is accessible to all other Web visitors. *See American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483. Current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community." *Reno III*, 31 F. Supp.2d at 484. This key difference necessarily affects our analysis in attempting to define what contemporary community standards should or could mean in a medium without geographic boundaries.

In expressing its concern over the wholly unprecedented broad coverage of the CDA's scope, the Supreme Court has already noted that because of the peculiar geography-free nature of cyberspace, a "community standards" test would essentially require every Web communication to abide by the most restrictive community's standards. *See Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. Similarly, to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material

that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

The government argues that subjecting Web publishers to varying community standards is not constitutionally problematic or, for that matter, unusual. The government notes that there are numerous cases in which the courts have already subjected the same conduct to varying community standards, depending on the community in which the conduct occurred. For example, the Supreme Court has stated that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the material [but that] does not render a federal statute unconstitutional because of the failure of the application of uniform national standards of obscenity." *Hamling v. United States*, 418 U.S. 87, 106, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974). Similarly, the government cites to the "dial-a-porn" cases in which the Supreme Court has held that even if the "audience is comprised of different communities with different local standards" the company providing the obscene material "ultimately bears the burden of complying with the prohibition on obscene messages" under each community's respective

standard. *Sable Comm. of California v. F.C.C.*, 492 U.S. 115, 125-26, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

These cases, however, are easily distinguished from the present case. In each of those cases, the defendants had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it. Therefore, the defendants could limit their exposure to liability by avoiding those communities with particularly restrictive standards, while continuing to provide the controversial material in more liberal-minded communities. For example, the pornographer in *Hamling* could have chosen not to mail unsolicited sexually explicit material to certain communities while continuing to mail them to others. Similarly, the telephone pornographers ("dial-a-porn") in *Sable* could have screened their incoming calls and then only accepted a call if its point of origination was from a community with standards of decency that were not offended by the content of their pornographic telephone messages.[20]

By contrast, Web publishers have no such comparable control. Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site. In fact, "an Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . com-

[20] The *Sable* court found that: "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law that may imposes such costs on a medium electing to provide these messages." *Sable* 492 U.S. at 125-26, 109 S. Ct. 2829.

munication[s] to different jurisdictions . . . The Internet user has no ability to bypass any particular state." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). As a result, unlike telephone or postal mail pornographers, Web publishers of material that may be harmful to minors must "comply with the regulation imposed by the State with the most stringent standard or [entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution." *Id.*

To minimize this distinction between Web publishers and all other forms of communication that contain material that is harmful to minors, the government cites to one Sixth Circuit case—presently the only case in which a court has applied a "community standards" test in the context of the electronic medium. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). The *Thomas* court determined that whether the material on the defendant's electronic bulletin board is harmful must be judged by the standards of each individual community wherein the disputed material was received, even if the standards in each of the recipient communities varied one from the next, and even if the material was acceptable in the community from which it was sent. *See id.* at 711. Despite the "electronic medium" in which electronic bulletin boards are found, *Thomas* is inapposite inasmuch as electronic bulletin boards, just as telephones, regular mail and other brick and mortar outlets, are very different creatures from that of the Web as a whole. *Thomas* itself recognized this difference, and by limiting its holding accordingly, completely undercuts the government's argument, stating explicitly that:

Defendants and Amicus Curiae appearing on their behalf argue that the computer technology used here requires a new definition of community, i.e., one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial. . . . Therefore, they contend . . . [bulletin board publishers] will be forced to censor their material so as not to run afoul of the standards of the community with the most restrictive standards. Defendants' First Amendment issue, however, is not implicated by the facts of this case. This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing. Access to the Defendants' [bulletin board] was limited. Membership was necessary and applications were submitted and screened before passwords were issued and materials were distributed. Thus, Defendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than in California . . . . If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability. . . . . Thus, under the facts of this case, there is not need for this court to adopt a new definition of "community' for use in obscenity prosecutions involving electronic bulletin boards. This court's decision is guided by one of the cardinal rules governing the federal courts, i.e., never reach constitutional questions not squarely presented by the facts of a case." *Id.* at 711-12.

Thus, it is clear that *Thomas* fails to support the government's position. Indeed, no federal court has yet ruled on whether the Web/Internet may be constitutionally regulated in light of differing community standards.

Our concern with COPA's adoption of *Miller*'s "contemporary community standards" test by which to determine whether material is harmful to minors is with respect to its overbreadth in the context of the Web medium. Because no technology *currently* exists by which Web publishers may avoid liability, such publishers would necessarily be compelled to abide by the "standards of the community most likely to be offended by the message" *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329, even if the same material would not have been deemed harmful to minors in all other communities. Moreover, by restricting their publications to meet the more stringent standards of less liberal communities, adults whose constitutional rights permit them to view such materials would be unconstitutionally deprived of those rights. Thus, this result imposes an overreaching burden and restriction on constitutionally protected speech.[21]

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[21] Even if we were to overlook the unconstitutional overbreadth of the COPA "contemporary community standards" test and if COPA were to be deemed effective, it still would not eliminate much of the harmful material which a minor could access. For example, minors could still access harmful material published by non-commercial Web publishers, and by foreign Web publishers. Thus, for example, materials "harmful to minors" but generated in foreign communities with contemporary community standards far more liberal than those of any state in the United States may, nevertheless, remain available and be exposed to

We recognize that invalidating a statute because it is overbroad is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). As such, before concluding that a statute is unconstitutionally overbroad, we seek to determine if the statute is "'readily susceptible' to a narrowing construction that would make it constitutional . . . [because courts] will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers' Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975)). *See also Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992); *Shea*, 930 F. Supp. at 939.

Two possible ways to limit the interpretation of COPA are (a) assigning a narrow meaning to the language of the statute itself, or (b) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact. *See e.g. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985); *Shea*, 930 F. Supp. at 939. We therefore turn our attention to whether either limiting construction is feasible here.

The government, in attempting to make use of the first of these salvaging mechanisms, suggests that we should interpret narrowly the "contemporary community standards" language in COPA as an "adult" rather than as a "geographic" standard. The House

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children in the United States by means of the Web/Internet, despite COPA's restrictions.

Report itself suggests this construction to sidestep the potential constitutional problems raised by the Supreme Court in interpreting the CDA's use of a "community standards" phrase. Congress explained:

> "The committee intends for the definition of material harmful to minors to parallel the Ginsberg and Miller definitions of obscenity and harmful to minors. . . . In essence, the Committee intends to adopt the 'variable obscenity' standard for minors. The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors." . . . . Thus, the person posting the material is engaged in interstate commerce and is subjecting himself to the jurisdiction of all communities in a manner similar to the way obscenity laws apply today.

H.R. REP. NO. 105-775 at 28 (1998). Congress reiterated this very position in its amicus brief stating: "COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful to Minors test." Brief of Members of Congress as *Amici Curiae*, at 16.

Despite the government's effort to salvage this clause of COPA from unconstitutionality, we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors. To the contrary, it is significant to us that throughout case law, community standards have always been interpreted as a geographic standard without uniformity. *See, e.g., Ameri-*

can Libraries Ass'n v. Pataki, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997) ("Courts have long recognized, however, that there is no single 'prevailing community standard' in the United States. Thus, even were all 50 states to enact laws that were verbatim copies of the New York [*obscenity*] Act, Internet users would still be subject to discordant responsibilities.").

In fact, *Miller*, the very case from which the government derives its "community standards" concept, has made clear that community standards are to be construed in a localized geographic context. "People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller* 413 U.S. at 33, 93 S. Ct. 2607. Even more directly, the Supreme Court stated in *Miller* that "our nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation. . . . To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Id.* at 30, 93 S. Ct. 2607. We therefore conclude that the interpretation of "contemporary community standards" is not "readily susceptible" to a narrowing construction of "adult" rather than "geographic" standard.

With respect to the second salvaging mechanism, it is an "'elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985) (quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1880)). As a result, if it is possible for a court to identify a particular part of the statute that is unconstitutional, and by striking *only* that *language* the court could leave the remainder of the statute intact and within the intent of Congress, courts should do so. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85, 107 S. Ct. 1476, 94 L.Ed.2d 661 (1987).

Here, however, striking "contemporary community standards" from COPA is not likely to succeed in salvaging COPA's constitutionality as this standard is an integral part of the statute, permeating and influencing the whole of the statute. We see no means by which to excise those "unconstitutional" elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional). This is particularly so in a preliminary injunction context when we are convinced that the very test or standard that COPA has established to determine what is harmful to minors is more likely than not to be held unconstitutional. *See Brockett*, 472 U.S. at 504-05, 105 S. Ct. 2794.

Our foregoing discussion that under either approach —of narrowing construction or deleting an unconstitutional element—COPA is not "readily susceptible" to a construction that would make it constitutional. We agree with the Second Circuit that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555

(2d Cir. 1988). As regulation under existing technology is unreasonable here, we conclude that with respect to this first prong of our preliminary injunction analysis, it is more likely than not that COPA will be found unconstitutional on the merits.[22]

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[22] Although our concern here has been with the overbreadth of the "contemporary community standards" clause, we recognize that if we were to address that portion of COPA which speaks to communications made for commercial purposes, 47 U.S.C. § 231(e)(2)(A), the Supreme Court has taught that "[f]or the purposes of applying the overbreadth doctrine . . . it remains relevant to distinguish between commercial and noncommercial speech." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n. 7, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). For instance, it has declined to apply the overbreadth doctrine to statutes regulating commercial advertising:

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context . . . [T]here are "commonsense differences" between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced . . .

Bates v. State Bar of Arizona, 433 U.S. 350, 380-81, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) (citations omitted). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 n. 6, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'").

However, although COPA regulates the commercial content of the Web, it amounts to neither a restriction on commercial advertising, nor a regulation of activity occurring "in the ordinary commercial context." *Bates*, 433 U.S. at 380-81, 97 S. Ct. 2691. As we have noted, the Web is a new type of medium which allows the average person with relatively little capital investment to place content on it for a commercial purpose. The speech such Web sites

Our holding in no way ignores or questions the general applicability of the holding in *Miller* with respect to "contemporary community standards." We remain satisfied that *Miller*'s "community standards" test continues to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology. *Miller* itself was designed to address the *mailing* of unsolicited sexually explicit material in violation of California law, where a publisher *could* control the community receiving the publication. *Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications. *See Reno II*, 521 U.S. at 889, 117 S. Ct. 2329 (O'Connor, J., concurring in judgment in part and dissenting in part) (noting that the "twin

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provide is in far greater danger of being stifled by government regulation than the commercial advertising at issue in cases such as *Bates* and *Central Hudson Gas*.

As the Supreme Court has also made clear, the benefits gained by the challenged statute must also outweigh the burden imposed on commercial speech. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L.Ed.2d 161 (1999) (in regulating commercial speech, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). *See also Sable*, 492 U.S. at 127, 109 S. Ct. 2829. Therefore, there is no inconsistency between our position that COPA is overbroad, and the line of authority refusing to apply overbreadth analysis to certain types of commercial speech.

characteristics of geography and identity" differentiate the world of Ginsberg [and *Miller*] from that of the Internet.).

B. Irreparable Harm By Denial of Relief

The second prong of our preliminary injunction analysis requires us to consider "whether the movant will be irreparably harmed by denial of the relief." *Allegheny Energy, Inc. v. DQE, Inc.* 171 F.3d 153, 158 (3d Cir. 1999). Generally, "[i]n a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *Reno I*, 929 F. Supp. 824 at 866. This case is no exception.

If a preliminary injunction were not to issue, COPA-affected Web publishers would most assuredly suffer irreparable harm—the curtailment of their constitutionally protected right to free speech. As the Supreme Court has clearly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). We, therefore, conclude that this element of our preliminary injunction analysis has been satisfied.

C. Injury Outweighs Harm

The third prong of our preliminary injunction analysis requires us to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). We are convinced that in

balancing the parties' respective interests, COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction. We are also aware that without a preliminary injunction, Web publishers subject to COPA would immediately be required to censor constitutionally protected speech for adults, or incur substantial financial costs to implement COPA's affirmative defenses.[23] Therefore, we affirm the District Court's holding that plaintiffs sufficiently met their burden in establishing this third prong of the preliminary injunction analysis.

D. Public Interest

As the fourth and final element of our preliminary injunction analysis, we consider "whether granting the preliminary relief will be in the public interest." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). Curtailing constitutionally protected speech will not advance the public interest, and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Reno I*, 929 F. Supp. at 866. Having met this final element of our preliminary injunction analysis, the District Court properly granted the ACLU's petition for a preliminary injunction.

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[23] These costs with respect to Web publishers and to those who desire access to those Web sites were enumerated by the District Court in its findings of fact.

III. CONCLUSION

Due to current technological limitations, COPA—Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web—is more likely than not to be found unconstitutional as overbroad on the merits.[24] Because the ACLU has met its burden in establishing all four of the necessary elements to obtain a preliminary injunction, and the District Court properly exercised its discretion in issuing the preliminary injunction, we will affirm the District Court's order.

In so affirming, we approvingly reiterate the sentiments aptly noted by the District Court: "sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Reno III*, 31 F. Supp.2d at 498.[25] We also express our confidence and firm conviction that developing technology will soon render the "community standards" challenge moot, thereby making congres-

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[24] Although much attention at the District Court level was focused on the availability, virtues and effectiveness of voluntary blocking or filtering software that can enable parents to limit the harmful material to which their children may otherwise be exposed, the parental hand should not be looked to as a substitute for a congressional mandate. *See also* n. 16 supra.

[25] "When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles." Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 521 (2000).

sional regulation to protect minors from harmful material on the Web constitutionally practicable. Indeed, in the context of dealing with technology to prevent the "bleeding" of cable transmissions, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 at ——, 120 S. Ct. 1878, 1883, 146 L.Ed.2d 865 at _____ (2000) recognized, as do we, that "technology may one day provide another solution."

Therefore, we will affirm the District Court's order dated February 1, 1999, issuing a preliminary injunction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. CIV. A. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

[Feb. 1, 1999]

MEMORANDUM

REED, District Judge.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Although there is no complete consensus on the issue, most courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered. Indeed, the First Amendment was designed to prevent the majority, through acts of

Congress, from silencing those who would express unpopular or unconventional views.

Despite the protection provided by the First Amendment, unconventional speakers are often limited in their ability to promote such speech in the marketplace by the costs or logistics of reaching the masses, hence, the adage that freedom of the press is limited to those who own one. In the medium of cyberspace, however, anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.

But with freedom come consequences. Many of the same characteristics which make cyberspace ideal for First Amendment expression—ease of participation and diversity of content and speakers—make it a potentially harmful media for children. A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web. For example, typing the word "dollhouse" or "toys" into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites. These Web sites offer "teasers," free sexually explicit images and animated graphic image files designed to entice a user to pay a fee to browse the whole site.

Intending to address the problem of children's access to these teasers, Congress passed the Child Online

Protection Act ("COPA"), which was to go into effect on November 29, 1998. On October 22, 1998, the plaintiffs, including, among others, Web site operators and content providers, filed this lawsuit challenging the constitutionality of COPA under the First and Fifth Amendments and seeking injunctive relief from its enforcement. Two diametric interests—the constitutional right of freedom of speech and the interest of Congress, and indeed society, in protecting children from harmful materials—are in tension in this lawsuit.

This is not the first attempt of Congress to regulate content on the Internet. Congress passed the Communications Decency Act of 1996 ("CDA") which purported to regulate the access of minors to "indecent" and "patently offensive" speech on the Internet. The CDA was struck down by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno I*") as violative of the First Amendment. COPA represents congressional efforts to remedy the constitutional defects in the CDA.

Plaintiffs attack COPA on several grounds: (1) that it is invalid on its face and as applied to them under the First Amendment for burdening speech that is constitutionally protected for adults, (2) that it is invalid on its face for violating the First Amendment rights of minors, and (3) that it is unconstitutionally vague under the First and Fifth Amendments. The parties presented evidence and argument on the motion of plaintiffs for a temporary restraining order on November 19, 1998. This Court entered a temporary restraining order on November 20, 1998, enjoining the enforcement of COPA until December 4, 1998. (Document Nos. 29 and 30). The defendant agreed to extend the duration

of the TRO through February 1, 1999. (Document No. 34). The parties conducted accelerated discovery thereafter. While the parties and the Court considered consolidating the preliminary injunction hearing with a trial on the merits, the Court, upon due consideration of the arguments of the parties, ultimately decided that it would proceed only on the motion for preliminary injunction. (Document No. 39). There necessarily remains a period for completion of discovery and preparation before a trial on the merits.

The defendant filed a motion to dismiss the entire action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing in addition to her arguments in response to the motion for preliminary injunction. (Document No. 50). The plaintiffs filed a response to the motion to dismiss (Document No. 69), to which the defendant filed a reply. (Document No. 81).

On the motion of plaintiffs for preliminary injunction, the Court heard five days of testimony and one day of argument on January 20, 1999 through January 27, 1999. In addition, the parties submitted briefs, expert reports, declarations from many of the named plaintiffs, designated portions of deposition transcripts, and documentary evidence for the Court's review. Based on this evidence and for the reasons that follow, the motion to dismiss will be denied and the motion for a preliminary injunction will be granted.

I. *The Child Online Protection Act*

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY.-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. § 231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

> person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231(c) provides that:

(c) AFFIRMATIVE DEFENSE.-

(1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

The disclosure of information collected in implementing the affirmative defenses is restricted in § 231(d):

(d) PRIVACY PROTECTION REQUIREMENTS.-

(1) DISCLOSURE OF INFORMATION LIMITED.-A person making a communication described in subsection (a)-

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of-

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) EXCEPTIONS.-A person making a communication described in subsection (a) may disclose such information if the disclosure is-

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

II. *Arguments of the Parties*

The arguments of the parties are plentiful and will be only summarized here for purposes of the motion for a preliminary injunction. Plaintiffs argue that COPA is unconstitutional on its face and as applied to them because the regulation of speech that is "harmful to minors" burdens or threatens a large amount of speech that is protected as to adults.[1] According to the plaintiffs, the fact that COPA is vague, overbroad, and a direct ban on speech that provides only affirmative defenses to prosecution contributes to the burden COPA places on speech. The plaintiffs argue that the affirmative defenses provided in COPA do not alleviate the burden on speech because their implementation imposes an economic and technological burden on speakers which results in loss of anonymity to users and consequently loss of users to its Web sites. The plaintiffs contend that the defendant cannot justify the burden on speech by showing that COPA is narrowly tailored to a compelling government interest or the least restrictive means to accomplish its ends. Alternatively, plaintiffs frame their facial attack to the statute as an overbreadth challenge, arguing that speech will be chilled on the Web because the statute covers more speech than it was intended to cover, even

[1] The plaintiffs are not challenging the provision of COPA that pertains to speech that is obscene. Thus, the enforcement of that provision of COPA is unaffected by this Memorandum and Order. Obscenity and child pornography have been the subject of other separate criminal statutes for many years. These laws are as well not implicated in this proceeding.

if it can be constitutionally applied to a narrow class of speakers. The plaintiffs also challenge COPA as being unconstitutionally vague under the First and Fifth Amendments and facially unconstitutional as to speech protected for minors.

Defendant argues that COPA passes constitutional muster because it is narrowly tailored to the government's compelling interest in protecting minors from harmful materials. The defendant argues that the statute does not inhibit the ability of adults to access such speech or the ability of commercial purveyors of materials that are harmful to minors to make such speech available to adults. The defendant points to the presence of affirmative defenses in the statute as a technologically and economically feasible method for speakers on the Web to restrict the access of minors to harmful materials. As to the plaintiffs' argument that COPA is overbroad, the defendant argues that the definition of "harmful to minors" material does not apply to any of the material on the plaintiffs' Web sites, and that the statute only targets commercial pornographers, those who distribute harmful to minors material "as a regular course" of their business. The defendant contends that plaintiffs cannot succeed on their motion for a preliminary injunction because they cannot show a likelihood of success on their claims and that their claim of irreparable harm is merely speculative.

Some of the defendant's substantive arguments are conceptually intertwined with her arguments in support of the pending motion to dismiss the complaint on the basis that the plaintiffs lack standing to attack the statute. The motion to dismiss will serve as a starting point for the Court's analysis.

III. *Resolution of Defendant's Motion to Dismiss*

Among other things, the "irreducible constitutional minimum" of standing requires that the plaintiffs allege that they have suffered or imminently will suffer an injury. It is well established that a credible threat of present or future criminal prosecution will confer standing. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that the Court was "unconcerned by the pre-enforcement nature of th[e] suit" and holding that the injury-in-fact requirement was met, in part, because "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) ("It is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Doe v. Bolton*, 410 U.S. 179, 188-89, 93 S. Ct. 739, 35 L.Ed.2d 201 (1973). The rationale underlying this rule is that a credible threat of present or future prosecution is itself an injury that is sufficient to confer standing, even if there is no history of past enforcement. *See Bolton*, 410 U.S. at 188, 93 S. Ct. 739. In part, this rationale is based on a recognition that a speaker who fears prosecution may engage in self-censorship, which is itself an injury.

"The standard-encapsulated in the phrase 'credible threat of prosecution'-is quite forgiving." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("*NHRLPAC*"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979). After

analyzing both Supreme Court precedent and federal appellate court decisions, the *NHRLPAC* Court concluded that "the preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, the court will assume a credible threat of prosecution in the absence of compelling contrary evidence." 99 F.3d at 15; *see also Babbitt*, 442 U.S. at 301-02, 99 S. Ct. 2301; *Doe*, 410 U.S. at 188, 93 S. Ct. 739; *American Booksellers*, 484 U.S. at 392-93, 108 S. Ct. 636; *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (even though no present danger of enforcement existed, a credible threat of prosecution existed because nothing would "prevent the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners"); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (holding that when a state statute "chills the exercise of First Amendment rights, standing exists even though the official charged with enforcement responsibilities has not taken any enforcement action against the plaintiffs and does not presently intend to take any such action").

The gravamen of the motion of defendant is that plaintiffs' fear of prosecution is wholly speculative and, therefore, not a credible threat sufficient to confer standing. The defendant argues that the plaintiffs lack standing because the material on their Web site is not "harmful to minors," and the plaintiffs are not "engaged in the business" of distributing harmful to minors materials under the statute. The defendant contends that the Court should narrowly construe COPA to apply to

those engaged in the business of commercial pornography, which does not include any of the plaintiffs.

There is nothing in the text of the COPA, however, that limits its applicability to so-called commercial pornographers only; indeed, the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes "that *includes any material* that is harmful to minors," and defines a speaker that is engaged in the business as one who makes a communication "that *includes any material* that is harmful to minors . . . as a regular course of such person's trade or business (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." (emphasis added). Because COPA applies to communications which include, but are not necessarily wholly comprised of material that is harmful to minors, it logically follows that it would apply to any Web site that contains only some harmful to minors material.

Based on the allegations of the complaint and the evidence and testimony presented to the Court, it appears that all of the individual plaintiffs except Electronic Privacy Information Center have some content on their Web sites or post some content on other sites that is sexual in nature.[2] All of the organizational

[2] Plaintiff Electronic Privacy Information Center ("EPIC") is a nonprofit education organization which studies civil liberties and privacy issues on the Internet. Thus, EPIC claims that it will suffer imminent injury as a user of the Web because it fears that it will have to incur costs or its staff will lose anonymity in accessing content on the Web and that content providers, to comply with COPA, will remove materials from their Web sites that it has been

plaintiffs have members who have some content on their Web sites or who post some content on other sites that is sexual in nature.[3] The plaintiffs contend that such sexual material could be considered "harmful to minors" by some communities.

The plaintiffs offer an interpretation of the statute which is not unreasonable, and if their interpretation of COPA's definition of "harmful to minors" and its application to their content is correct, they could potentially face prosecution for that content on their Web sites. *Vermont Right to Life Comm. Inc. v. Sorrell*, 19 F. Supp.2d 204, 210 (D. Vt. 1998) (plaintiffs had standing to challenge campaign finance statute, even though State argued that the plaintiffs were and had been

able to access and study in the past. (Complaint ¶¶ 137-141). The First Amendment protects the right to "receive information and ideas." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (internal quote omitted); *see also Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 7, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (noting that the First Amendment protects the public's interest in receiving information); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1254-55 (3d Cir. 1992) (same).

[3] Furthermore, the four organizations who are bringing suit on behalf of their members—the American Civil Liberties Union, the American Booksellers Foundation for Free Expression, the Electronic Frontier Foundation and the Internet Content Coalition—have averred facts sufficient to support their standing to facially challenge the statute. *See, e.g., Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). In each case, members of their respective organizations would have standing in their own right, the interest each organization seeks serves to protect is germane to its purpose and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.*

complying with disclosure requirements and that internal group mailings or an isolated distribution of flyers at a county fair are "a far cry from the mass media activities contemplated by the legislature" because the statute on its face could be applied to the activities of the plaintiffs). Moreover, in the First Amendment context, courts recognize a that litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *American Booksellers*, 484 U.S. at 393, 108 S. Ct. 636 (internal quotation and citation omitted). This Court concludes that the plaintiffs have articulated a credible threat of prosecution or shown that they will imminently suffer an injury sufficient to establish their standing to bring this lawsuit. Accordingly, the motion to dismiss will be denied.

IV. *Standard for a Preliminary Injunction*

To obtain a preliminary injunction, the plaintiffs must prove: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the preliminary injunction issues than to the plaintiffs if the preliminary injunction does not issue; and (4) that the public interest, if any, weighs in favor of plaintiffs. *See Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998).

V. *Findings of Fact*

Based on all the evidence admitted at the preliminary injunction hearing, the Court makes the following findings of fact.[4]

The parties submitted a Joint Stipulation of Uncontested Facts at the preliminary injunction hearing. (Joint Exhibit 3). Findings of fact numbered 1 through 20 and other findings as indicated are taken from the Joint Stipulation to provide background.

A. *The Internet and the World Wide Web*

0. The Internet is a giant network that interconnects innumerable smaller groups of linked computer networks: a network of networks. (Joint Exhibit 3 ¶ 1).

1. The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. However, it is indisputable that the Internet has experienced extraordinary growth in the past few years. In 1981, fewer than 300 com-

[4] The final adjudication of this case will not occur until after a trial on the merits, and thus, the parties may present further evidence at that trial. The findings of fact entered today, unless the result of a stipulation of the parties or based upon substantially identical testimony by witnesses for both sides, are characterized by the Court unconventionally as "testimony" or "evidence presented" so that the Court can explain the evidentiary basis for this Court's legal conclusion that the plaintiffs have met their burden under Federal Rule of Civil Procedure 65 to establish their right to the injunction they seek. Thus, these provisional findings will govern the case until conclusive findings of fact on the merits of the case are entered after the trial.

puters were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, however, over 1,000,000 computers were linked. The number of host computers has more than tripled from approximately 9.4 million hosts in January 1996 to more than 36.7 million hosts in July 1998. Approximately 70.2 million people of all ages use the Internet in the United States alone. (Joint Exhibit 3 ¶ 3).

2. Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions; some are owned by non-profit organizations; and some are privately owned. The resulting whole is a decentralized, global medium of communications—or "cyberspace"—that links individuals, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of individuals interested in a particular subject, or to the world as a whole. (Joint Exhibit 3 ¶ 4).

3. The content on the Internet is as diverse as human thought. The Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet often are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and

magazines. Creation of a Web site can range in cost from a thousand to tens of thousands of dollars, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as America Online allow subscribers to create a limited number of Web pages as a part of their subscription to AOL services. Any Internet user can communicate by posting a message to one of the thousands of available newsgroups and bulletin boards or by creating one of their own or by engaging in an on-line "chat", and thereby potentially reach an audience worldwide that shares an interest in a particular topic. (Joint Exhibit 3 ¶ 12).

4. Individuals can access the Internet through commercial and non-commercial "Internet service providers" of ISPs that typically offer modem access to a computer or computer network linked to the Internet. Many such providers are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. (Joint Exhibit 3 ¶ 18).

5. Another common way that individuals can access the Internet is through one of the major national commercial "online services" such as America Online or the Microsoft Network. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to

the extensive content available within each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services have millions of individual subscribers across the United States. (Joint Exhibit 3 ¶ 19).

6. In addition to ISPs, individuals may be able to access the Internet through schools, employers, libraries, and community networks. (Joint Exhibit 3 ¶¶ 14-17).

7. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network, utilizing a number of different Internet "protocols." These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

(1) one-to-one messaging (such as "e-mail"),

(2) one-to-many messaging (such as "listserv" or "mail exploders"),

(3) distributed message databases (such as "USENET newsgroups"),

(4) real time communication (such as "Internet Relay Chat"),

(5) real time remote computer utilization (such as "telnet"), and

(6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (i.e., pictures), and moving video images. (Joint Exhibit 3 ¶ 22).

8. When persons communicate solely via e-mail, they utilize a protocol known as SMTP (for simple mail transfer protocol). Similarly, persons may chat using the Internet Relay Chat protocol, or may post messages on "Usenet" news groups using a protocol referred to as NNTP. The communications listed above in categories (1) through (5) do not involve communicating by means of "HTTP" or hypertext transfer protocol, which is the protocol effected by COPA. (Joint Exhibit 3 ¶ 23).

9. Web-based chat rooms, e-mail, and newsgroups utilizing HTTP or hyper-text transfer protocol are interactive forms of communication, providing the user with the opportunity both to speak and to listen. (Joint Exhibit 3 ¶ 24).

10. The primary method of remote information retrieval today is the World Wide Web. (Joint Exhibit 3 ¶ 25).

11. The World Wide Web, or the "Web," uses a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text,

images, sound, animation and moving video stored in many other formats. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, an individual can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world. (Joint Exhibit 3 ¶ 26).

12. The World Wide Web was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge. (Joint Exhibit 3 ¶ 27).

13. Many organizations now have "home pages" on the Web. These are documents that provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization. (Joint Exhibit 3 ¶ 30).

14. Links may also take the user from the original Web site to another Web site on another computer con-

nected to the Internet. The ability to link from one computer to another, from one document to another across the Internet regardless of its status or physical location, is what makes the Web unique. (Joint Exhibit 3 ¶ 31).

15. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running Web server software. The computer can be as simple as a small personal computer costing less than $ 1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself. (Joint Exhibit 3 ¶ 32).

16. A variety of systems have developed that allow users of the Web to search for particular information among all of the public sites that are part of the Web. Services such as Yahoo, Excite!, Altavista, Webcrawler, Infoseek, and Lycos are all services known as "search engines" or directories that allow users to search for Web sites that contain certain categories of information, or to search for key words.

17. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be

blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point. (Joint Exhibit 3 ¶ 37).

18. Once a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community. Unlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience. Because the Internet is a network of networks, any network connected to the Internet has the capacity to send and receive information to any other network. (Joint Exhibit 3 ¶ 41).

19. Sexually explicit material exists on the Internet. Such material includes text, pictures, audio and video images, extends from the modestly titillating to the hardest core. Some Web sites display for free what appear to be still or moving images of a sexually explicit nature. Sexually explicit materials exist on Web pages and on Web-based and non-Web based interactive fora. It exists on sites based in the United States and sites based outside the United States. (Joint Exhibit 3 ¶ 43).

20. There was no evidence in the record regarding the number of Web sites which are posted within the United States. However, based on a statistic from July of 1998 on the percentage of Internet hosts that originate in the United States, Dr. Donna Hoffman estimated that 60% of all content originates in the United States and 40% originates outside the United States. (Hoffman Testimony).

B. *The Speech Provided by the Plaintiffs*

21. The plaintiffs represent a broad range of individuals, entities, and organizations suing on behalf of their members, who are speakers, content providers, and ordinary users on the Web. Some of the plaintiffs post, read, and respond to content including, *inter alia*, resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines. (Plaintiffs' Declarations; Testimony of Talbot, Laurila, Barr, Rielly, and Tepper).

22. Internet users of all ages access content provided by the plaintiffs over the Web. At least some of the plaintiffs provide interactive fora such as Web-based electronic mail (email), Web-based chat, and Web-based discussion groups. Content providers and Web site operators who offer interactive fora, including some of the plaintiffs, usually select the topic or topics that will be interactively "discussed" by users through reading and posting content. (Plaintiffs' Declarations; Talbot Testimony; Rielly Testimony).

23. The vast majority of information on the plaintiffs' Web sites, as on the Web in general, is provided to users for free. (Plaintiffs' Declarations; Hoffman Testimony).

24. The plaintiffs are a diverse group of speakers, which was illustrated by the live testimony and

declarations that were submitted to the Court.[5] Christopher Barr, the vice president and editor-in-chief of CNET, testified that CNET's Web site provides news on a variety of topics which is available to users for free. CNET is supported by advertising that is displayed on its Web page. Barr testified that while he did not think that any material on CNET was harmful to minors, CNET feared prosecution under COPA for materials of a sexual nature on its Web site, particularly links provided in articles on the site to other sites on the Web and materials that may be downloaded for free by a user from the site. Barr testified that articles on the site in the past have linked to Playboy's Web site, and that a Kama Sutra screen saver, which includes forty drawings of people engaged in sexual contact, can be downloaded onto a user's computer. Barr testified that while CNET had not yet developed a policy regarding what the site would do to comply with COPA or where it

[5] The Court considered live testimony and declarations of the plaintiffs which was submitted at both the preliminary injunction hearing and the temporary restraining order hearing. Declarations were submitted by Dr. Jeffrey Scott Levy of OBGYN.net; Nikki Douglas of RiotGrrl; Charles Tarver of BlackStripe; Nadine Strossen, member of the ACLU; Mark Segal of Philadelphia Gay News; Jon E. Noring of the Electronic Frontier Foundation (EFF); Marc Rotenberg of the Electronic Privacy Information Center; John William Boushka of EFF; David Bunnell, member of the ACLU; Lawrence Ferlinghetti of City Lights Bookstore and member of the ACLU; Richard P. Groman of West Stock; Miriam Sontz of Powell's Bookstore; Christopher Finan of the American Booksellers for Free Expression; Adam K. Glickman of Addazi, Inc. d/b/a Condomania; Ernest Johnson of ArtNet Worldwide Corporation, Roberta Speyer of OBGYN.net, Barry Steinhardt of EFF; and Patricia Nell Warren, a member of the ACLU.

would place screening devices, if at all, he stated that CNET would probably opt to self-censor the content of the site. (Barr Testimony).

25. Mitchell Steven Tepper, a member of the ACLU, is owner and operator of the Sexual Health Network, a Web site that he runs out of his home in Connecticut. The mission of his Web site is to provide easy access to information about sexuality geared toward individuals with disabilities. In addition to content which Tepper provides on the site, he also offers interactive components, including a bulletin board, where users may post comments, and a chat room. While any user can access the content on his site for free, Tepper is trying to make a profit from the site through advertising, but as yet has been unsuccessful. Tepper testified that Sexual Health Network fears prosecution under COPA based on the content of this site, which is almost exclusively sexual in nature and which contains, for example, information on sexual surrogacy as a form of sexual therapy and advice on how a large man and a small women should position themselves comfortably for intercourse. Tepper expressed concern that because of the sexual nature of his Web site, implementing one of the affirmative defenses in COPA on his Web site would have the effect of driving viewers away from his site because the users would not want to disclose personal information that reveals their identity in connection with his site. Tepper also testified that he believed that utilizing a third party age verification service would reduce the amount of traffic on his site because of the stigma and costs to the user associated with such services. (Tepper Testimony).

26. Thomas P. Rielly is the founder and chairman of PlanetOut, a Web site directed to developing an online community for gay, lesbian, bisexual, and transgendered people. PlanetOut's primary revenue comes from advertising on the site. Rielly testified that the Internet is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reactions of others because it allows closeted people access to this information while preserving their anonymity. PlanetOut provides a member form for users who would like to register in order to receive free benefits, but it does not require membership to access its site. Rielly estimated that less than 10% of the users to his site have registered, and PlanetOut does not verify the registration information provided by the user. The site includes a bulletin board, on which users may post and read messages, and chat rooms. The chat rooms are open 24 hours a day, during which they are monitored by a person for some of the time. Rielly testified that it would be impracticable to monitor all the chat on the site, and that there is no way to edit the content of chat before it is posted. (Rielly Testimony). PlanetOut contains some content of a sexual nature, including chat profiles of users, at least one of which included a photograph of a male with exposed genitals, and Internet radio shows with "Dr. Ruthless" on topics such as anal sex and masturbation. (Plaintiffs' Exs. 75, 76). Other areas of PlanetOut's site are not sexual in nature. Rielly testified that he predicted that traffic to his site would drop off if he were to require credit card or other age verification on PlanetOut; to support this prediction, he noted that the traffic to a competitor's site which had placed

its entire content behind a credit card wall and charged users $10 per month only grew to 10,000 total users. While PlanetOut currently cannot process credit cards on its site, it plans to develop its ability to conduct direct commercial transactions over the Web in the future. (Rielly Testimony).

C. ***Commercial Activity on the Web***

27. E-commerce, or commercial transactions which are conducted online, is rapidly increasing. (Defendant's Ex. 188). Hoffman testified that there are 3.5 million Web sites globally on the Web, and approximately one third of those sites are commercial, that is Web sites that intend to make a profit. By the year 2003, it is estimated that the total revenues from the Web, including revenues from ISPs, business to business commerce, and business to consumer commerce, will reach $ 1.4 to $ 3 trillion. (Hoffman Testimony). There is no doubt that growth on the Web is explosive.

28. There are many reasons that may explain such expansive growth. For example, the Web is attractive to businesses because there are low barriers to entry as compared to other forms of commerce and the Web offers a global market or audience of all ages. The Web is attractive to consumers of all ages because a wide array of products and services are offered in an environment which attempts to provide those consumers with "full information." (Hoffman Testimony).

29. Despite the explosive growth and popularity on the Web, not all companies who operate Web sites are making money online. (Hoffman Testimony).

30. Hoffman testified that there are five general business models operating on the Web: (1) the Internet presence model, which involves no direct sales or advertising but is used by a business to raise customer awareness of the name and products of the Web site operator, (2) the advertiser supported or sponsored model, in which nothing is for sale, content is provided for free, and advertising on the site is the source of all revenue, (3) the fee based or subscription model in which users are charged a fee before accessing content, (4) the efficiency or effective gains model, by which a company uses the Web to decrease operating costs, and (5) the online storefront, in which a consumer buys a product or service directly over the Web. (Hoffman Testimony).

31. Dr. Hoffman testified that the most popular business model is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web. The fee based or subscription model is the least popular on the Web, although there are some successful examples of this model, such as the *Wall Street Journal* Web site. It is possible for a Web site to adopt a business model that is a hybrid of these five models. (Hoffman Testimony).

32. As online storefront models and general commercialization on the Web proliferates, the use of credit cards online and the requirement that users complete fill-out forms or register with a site will increase. (Hoffman Testimony).

33. The plaintiffs employ a variety of different business models. Some of the plaintiffs receive income from

the operation of their sites by selling advertising on their Web sites. Some of the plaintiffs charge other Internet speakers, such as fine artists, fine art galleries, or audio or video content creators, to post relevant content on their Web sites. Some of the plaintiffs sell goods over their Web sites, ranging from millions of books, to condoms and other sexual health devices, to books that they authored themselves. Some of the plaintiffs generate revenue by combining these business models. (Plaintiffs' Declarations; Testimony of Barr, Rielly, Tepper, Talbot, Laurila).

34. Dr. Hoffman testified that investors evaluate an e-business by the number of customers they believe the Web site is able to attract and retain over time, or "traffic." She believes that traffic is the most critical factor for determining success or potential for success on a Web site. The best way to stimulate user traffic on a Web site is to offer some content for free to users. Thus, virtually all Web sites offer at least some free content. (Hoffman Testimony).

35. Dr. Hoffman testified that another factor affecting traffic to a Web site is "flow." Interactivity increases a users interest level on the Web, which in turn results in return visits to the Web by users. "Flow" describes an online experience in which the user is completely engaged and focused while browsing or surfing the Web, has a sense of control over the experience, and has a proper mix of skills and challenges. Because return users equal more traffic to Web sites, facilitating a user's flow experience is related to a Web site's commercial

success. There are many factors that could disrupt a user's flow, including registration screens, broken links on a site, or poor site design. (Hoffman Testimony and Expert Report).

36. Dr. Hoffman observed in her testimony that in general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase. (Hoffman Testimony). Some Web sites that have required registration or a payment of a fee before granting access to a user to the site have not been successful, such as HotWired and Idea Market. Other Web sites that require a credit card to make a purchase have been successful in obtaining such information from users, such as Amazon.com. (Hoffman Testimony). Through studies that she has conducted and her observations of consumer behavior online, Hoffman concluded that consumers on the Web do not like the invasion of privacy from entering personal information, that their willingness to reveal personal information to a Web site is connected to the degree of trust the user has of the Web site, and that usually users will only reveal credit card information at the time they want to purchase a product or service. (Hoffman Testimony).

D. *Burden of Implementing the Affirmative Defenses Provided in COPA*

37. COPA provides three affirmative defenses that speakers may utilize to avoid prosecution for communicating harmful to minors materials: (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number, (2) accepting a digital certificate that verifies age, or (3) any other reasonable measures that are feasible under available technology. The parties' expert witnesses agree that at this time, while it is technologically possible, there is no certificate authority that will issue a digital certificate that verifies a user's age. (Farmer Testimony; Olsen Testimony). The plaintiffs presented testimony that there are no other reasonable alternatives that are technologically feasible at this time to verify age online. (Farmer Testimony). The defendant did not present evidence to the contrary.

38. It appears that the parties agree that the technology required to implement credit card authorization and adult access codes on a Web site is currently available and used on the Web. (Olsen Testimony; Farmer Testimony).

39. Depending on (1) the amount of content on a Web site, (2) the amount of that content that could be considered "harmful to minors," (3) the degree to which a Web site currently is organized into files and directories, (4) the degree to which "harmful to minors" content currently is segregated into a particular file or directory on the Web site, and (5) the level of expertise of the Web site operator, the technological requirements for implementing the affirmative defenses of credit card verification or accepting adult access codes or PINs ranges in the testimony of the parties from trivial (Olsen Testimony) to substantial (Farmer Testimony). The specific technological requirements of and costs associated with both affirmative defenses are detailed below.

1. *Technological Requirements and Out-of-Pocket Costs of Implementing Credit Cards*

40. To obtain credit card verification from users before granting access to harmful to minors materials, a Web site would need to construct a credit card screen in front of such materials. (Farmer Testimony). It is not disputed that a credit card or age verification screen can be placed at any point on a Web site: on the last page, or in front of an area of the site, or on select pages throughout the site, or at the beginning of the site on the home page. (Farmer Testimony; Tepper Testimony).

41. The parties agree that to implement the verification of credit card numbers, a Web site would need to undertake several steps, including (1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit cards numbers or passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers. (Olsen Testimony; Farmer Testimony).

42. The evidence shows that the cost of credit card verification services range from a start-up cost of approximately $300, plus per transaction fees, for a service that does not automatically verify or authorize the credit card numbers on the site to thousands of dollars in start-up costs, plus per transaction fees, to set up online credit card verification. (Tepper Testimony; Farmer Testimony).

43. Alternatively, a Web site could retain the services of a third party to provide online management of the verification of credit cards, but the Web site would incur costs for such services. (Olsen Testimony).

44. The parties agree that if a Web site is using an ISP that does not support credit card verification or CGI scripts, a Web site may need to transfer the content to another ISP or its own server. (Farmer Testimony; Olsen Testimony). The plaintiffs proffer that a secure server which supports credit card verification may cost a few thousand dollars. (Farmer Testimony).

45. There is no dispute that there are two types of credit card transactions that occur over the Internet: (1) an "authorize only" transaction (which determines whether the credit card number is valid and can be used to make a purchase), and (2) a "funds capture" transaction (which charges a particular amount to the user's credit card for a product or service). A fee is charged to the content provider every time a credit card number is authorized; such transaction fees would be approximately $.15 to $.25 per transaction. (Farmer Testimony; Olsen Testimony). Such authorization is not indicated on the credit card holder's monthly statement. (Olsen Testimony; Farmer Testimony). However, it is not clear from the conflicting testimony presented at the preliminary injunction hearing whether credit card verification services or clearinghouses will authorize or verify a credit card number in the absence of a subsequent funds capture transaction. (Farmer Testimony; Olsen Testimony).

46. The parties' experts agree that to avoid incurring the costs of authenticating a credit card number every time a user wants to access harmful to minors content behind the screen, a Web site operator could maintain a database of credit card numbers provided by previous users to the site, enabling the credit card number of a repeat user to be verified through the database. Thus, a Web site would only incur the cost of authorization one time per year for each new user to the screened content. (Farmer Testimony; Olsen Testimony). A content provider could also provide users with a password once their credit card has been authorized and store the valid passwords in a database; to return to a screened portion of the site, a return user would enter her password. A Web site could store encrypted credit card numbers or passwords on the site to reduce security risks associated with storing such information online. (Farmer Testimony; Olsen Testimony). Creating and maintaining such a database would impose some technological burdens and economic costs on a content provider, but a simple database could be constructed without much expense. (Farmer Testimony, Olsen Testimony).

48. The plaintiffs presented testimony that a minor may legitimately possess a valid credit or debit card. (Farmer Testimony). Of course, a minor may obtain the permission of her parents to use a parent's credit card as well. The defendant presented no evidence to the contrary.

2. Technological Requirements and Costs Associated with Adult Access Codes or PINs

48. The knowledgeable witnesses for the parties agree that there are approximately twenty-five services on the Web which will provide adult access codes or personal identification numbers. Adult access codes and adult personal identification numbers (PINs) are passwords that allow a user to access either an entire site or a restricted area of a Web site that accepts that particular access code or PIN. (Alsarraf Testimony, Farmer Testimony).

49. Laith Alsarraf, the president and CEO of Cybernet Ventures, testified on behalf of the defendant at the preliminary injunction hearing regarding the adult verification service, Adult Check, provided by his company. Once an Adult Check screen is inserted at some point into a Web site, that portion of the Web site is blocked to everyone unless they possess a valid Adult Check PIN. A Web site operator can sign up for free with Adult Check to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by users who sign up with Adult Check to view screened content on the site. Adult Check provides the Web site operator with a script, free of charge, which can be placed at any point on the Web site where the content provider wishes to block access to minors. (Alsarraf Testimony).

50. The parties do not dispute that a user who comes across an Adult Check screen on a Web site may click on the link to the Adult Check site and immediately apply for an Adult Check PIN online.

(Alsarraf Testimony). Technically, almost all Web sites can link to such a third party, and the link may be placed anywhere on the Web site. (Farmer Testimony).

51. A user may obtain an Adult Check PIN for $16.95 per year. Adult Check accepts payment by credit card online, or a user may elect to fax or mail an application and a check and a copy of a passport or driver's license to Adult Check. (Alsarraf Testimony).

52. According to Alsarraf, approximately three million users possess a valid Adult Check PIN. The number of Web sites currently using Adult Check is approximately 46,000. Adult Check provides a list of links to other sites utilizing Adult Check PINs on its Web site. The vast majority of these links are to adult entertainment sites. (Alsarraf Testimony).

53. Alsarraf explained that Adult Check utilizes mechanisms whereby it attempts to track fraudulent use of the Adult Check PINs. If Adult Check determines that a PIN is being used fraudulently, that PIN is immediately invalidated. In addition, Adult Check offers free tools to Web sites to prevent a user from bookmarking a page containing harmful to minors material on a Web site and later returning to that page without first passing through the Adult Check screen. A Web site would have to implement such tools to prevent a user from attempting such an end-run around the screen. (Alsarraf Testimony). The Court infers that similar tools should be technically available to

other Web sites which have implemented screening by other methods, such as credit cards.

3. *Reorganizing a Web Site to Segregate Harmful to Minors Materials*

54. It appears clear to all the parties that to place potentially harmful to minors materials behind credit card or adult verification screens, some reorganization of the Web site would be required. (Farmer Testimony; Olsen Testimony). To do this, a content provider could reorganize the files in the Web site's directory, which is a place on the site which can hold such files, to disallow files containing material that is harmful to minors from being served to a user unless she enters a credit card number or adult access code or PIN. (Farmer Testimony, Olsen Testimony). A Web site can organize its directories and the files within the directories in any way it chooses. (Olsen Testimony; Farmer Testimony).

55. It appears uncontradicted that a content provider can segregate potentially harmful to minors images from other non-harmful to minors images and text on a single web page by organizing the potentially harmful to minors images into a separate directory such that a user could only call up those images on the page once she had entered her adult PIN, adult access code, or credit card number. The other images and text on the page would appear for all users. (Alsarraf Testimony). Text is more difficult to segregate than images, and thus if a written article contains only portions that are potentially harmful to minors, those portions cannot be hidden behind age verification screens without hiding the

whole article or segregating those portions to another page, without the use of Java scripts or other technology that would allow the text to be pieced back together once a user entered a credit card, access code, or PIN. (Farmer Testimony; Olsen Testimony).

56. The party's experts appear to agree that the length of time required for, and economic costs incurred by, a content provider to review the content currently on a Web site for potentially harmful to minors materials and reorganize or segregate such content depends (1) on the amount of content on a Web site, (2) whether the Web site operator or content provider can utilize a search mechanism to review its content, (3) whether a Web site is already organized into files and directories according to content, and (4) the familiarity a Web site operator has with the content of the files and directories. (Farmer Testimony; Olsen Testimony). The effort required to segregate new content on an ongoing basis over time once a Web site has been organized to implement the affirmative defenses in COPA may be a relatively easier and less expensive task for a Web site operator. (Olsen Testimony).

57. Some of the plaintiffs have contracts with advertisers, ISPs, or bounty partners which prohibit the Web site's ability to place advertisements near particular content on the Web site or post particular content that contains nudity or that is of a sexually explicit nature. (Defendant's Exs. 25 (under seal) and 105; Tepper Testimony). Such contracts indicate that market forces may necessitate Web site

operators and content providers who rely on advertising revenue to segregate content of a sexual nature regardless of COPA.

58. Once again the experts agreed that the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora, or to implement a full-time monitor on the site to read all content before it is posted. Because of the dynamic nature of the content of such interactive fora, there is no method by which the creators of those fora could block access by minors to harmful to minors materials and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors. (Farmer Testimony; Olsen Testimony).

4. *Security Issues*

59. COPA requires that content providers or Web site operators take the necessary precautions to prevent unauthorized access to the information they receive from users during the age verification process. Implementing security measures to safeguard the information provided by users, such as the use of encryption methods, SSLs, and secure servers, will impose some additional technological burdens and economic costs on Web site operators.

5. *Effect of Complying with COPA on Traffic*

60. Hoffman testified that she concluded in light of consumer behavior on the Web that COPA would

have a negative effect on users because it will reduce anonymity to obtain the speech and reduce the flow experience of the user, resulting in a loss of traffic to Web sites. She testified that it was her prediction that content providers would have to adopt one or more methods to comply with COPA by (1) eliminating content on the site that was, or potentially could be considered, harmful to minors, or (2) erect a age verification system on their Web site in front of harmful to minors materials, or (3) alter the questionable content to comply with COPA. Hoffman opined that whatever method of compliance a speaker elected, users may visit other sites which offered such material without a screen, which would result in loss of traffic to a site. (Hoffman Testimony). Olsen, one of the experts who testified for the defendant, conceded in his testimony that the number of users deterred from a site by registration requirements imposed by COPA could be in the thousands. (Olsen Testimony).

61. Hoffman testified that she concluded that the out of pocket costs associated with complying with COPA did not constitute the real economic burden on content providers, but rather it was the economic harm that would result from loss of traffic to the site that constituted the burden. Even though a Web site operator could pass the cost of compliance with COPA on to the consumer, Hoffman testified that in general users would refuse to pay to access content on the site.

62. Brian L. Blonder, an accountant with expertise in evaluating business plans and economic conduct,

testified that in his opinion, COPA would not impose an unreasonable economic burden from either out-of-pocket costs or loss of viewers on the seven Web sites of the plaintiffs which he investigated, including ArtNet, CNET, Salon Magazine, A Different Light Bookstore, Sexual Health Network, Planet Out, and Free Speech Media. (Blonder Testimony and Supplemental Expert Report).

63. It is reasonable to infer that the number of users deterred from a screened Web site or a screened portion of a Web site and the economic impact that such loss of viewers may have on a Web site depends in part on the number of users that visit the site, the strength of the motivation of the user to access the screened material, and the economic resources and revenues available to the Web site from other sources and content. The plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens.

E. *Blocking or Filtering Software*

64. The plaintiffs contend that a lesser restrictive means to achieve the goal of Congress of restricting the access of minors to materials that are harmful to them is the use of "blocking" or "filtering" technology.

65. It appears that the parties do not dispute that blocking or filtering software may be used to block Web sites and other content on the Internet that is inappropriate for minors. Such technology may be

downloaded and installed on a user's home computer at a price of approximately $40.00. Alternatively, it may operate on the user's ISP. Blocking technology can be used to block access by minors to whole sites or pages within a site. (Olsen Testimony). Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP. (Olsen Testimony).

66. It appears undisputed that blocking and filtering technology is not perfect in that it is possible that some Web sites that may be deemed inappropriate for minors may not be blocked while some Web sites that are not inappropriate for minors may be blocked. In addition, a minor's access to the Web is not restricted if she accesses the Web from an unblocked computer or through another ISP. It is possible that a computer-savvy minor with some patience would be able to defeat the blocking device. (Magid Testimony). No evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive.

67. Several Web sites associated with plaintiffs or declarants in this litigation, including Web sites of Condomania, Electronic Frontier Foundation, RiotGrrl, Sexual Health Network, A Different Light, PlanetOut, and Philadelphia Gay News, are currently blocked by SurfWatch and Cyberpatrol, which are two blocking or filtering programs. (Joint Stipulation Exhibit 3 ¶¶ 45-51).

VI. *Analysis of the Motion for Preliminary Injunction and Conclusions of Law*

A. *Substantial Likelihood of Success on the Merits*

For the purposes of the motion for preliminary injunction, the Court will focus its analysis on the claim of plaintiffs that COPA is unconstitutional on its face for violating the First Amendment rights of adults. The first task of the Court is to determine the level of scrutiny to apply to COPA; then the Court must apply that level of scrutiny to the statute to determine whether plaintiffs are likely to succeed on their claim that it does not pass constitutional muster.

1. *Standard of Scrutiny*

COPA is a content-based regulation of speech which is protected at least as to adults. Although there are lower standards of scrutiny where the regulation of general broadcast media or "commercial" speech, that is, speech that proposes a commercial transaction, are involved, neither is appropriate here. In *Reno I*, the Supreme Court found that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium," rejecting the argument that the lowered level of scrutiny applied to the broadcasting medium should be applied to the Internet. *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2344, 138 L.Ed.2d 874 (1997). The defendant asserted in her brief that the statute may be subject to the lower level of scrutiny which has been applied to the regulation of "commercial speech;" however, the defendant did not press that position for the purposes of the temporary restraining order, nor did she argue this position at the preliminary injunction hearing.

Further, it is clear that the case law setting forth the standard of scrutiny for the regulation of commercial speech is inapplicable to the statute before the Court.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). As a content-based regulation of such expression, COPA is presumptively invalid and is subject to strict scrutiny by this Court. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2351, 138 L.Ed.2d 874 (1997). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126, 109 S. Ct. 2829 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve compelling interests must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* Thus, the burden imposed on speech must be outweighed by the benefits gained by the challenged statute. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See, e.g., Sable*, 492 U.S. at 127, 109 S. Ct. 2829 (citing

Butler v. Michigan, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957) (reversing a conviction under a statute which made it an offense to make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

2. *Burden on Speech Imposed by COPA*

The first step in determining whether a statute passes strict scrutiny is to assess the burden the statute places on speech. A statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression. *See Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 785 (3d Cir. 1990). One such deterrent can be a financial disincentive created by the statute. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991). The Court in *Erznoznik* noted that the regulation on speech at issue left the speaker "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

In *Simon & Schuster*, in which the constitutionality of a New York statute which required that the proceeds of any publication of any person who committed a crime be placed in an escrow account for the benefit of

the victims of the crime, the Supreme Court noted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." 502 U.S. at 115, 112 S. Ct. 501. "In the context of financial regulation, it bears repeating, . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116, 112 S. Ct. 501. The Court considered this law to be similar to an unconstitutional tax based on the content of speech, as "[b]oth forms of financial burden operate as disincentives to speak." *Id.* at 117, 112 S. Ct. 501. The Supreme Court found that the challenged law established a financial disincentive to create or publish works with a particular content, and as such, the government must justify such differential treatment by showing that the statute was necessary to serve a compelling interest and it narrowly drawn to achieve that end. *Id.*, at 118, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit considered the constitutionality of an amendment to the Pennsylvania Public Utility Act which required adults who wished to listen to sexually explicit recorded telephone messages to apply for an access code to receive such messages. The court noted that requiring an adult to obtain an access code exerted an inhibitory effect on speech, which "raises issues comparable to those raised by direct [government] imposed burdens or restrictions." *Id.* The court affirmed the district court's finding that access codes would chill or inhibit potential adult users of dial-a-porn, based on testimony that "impulse callers" would not access the material if they must apply for an access code, as well

as evidence that the plaintiffs' revenues dropped to $0 when they switched to an identification number system and the lack of any evidence from the Commonwealth to rebut the showing by plaintiffs. *Id.* at 785-86.

The district court in *Fabulous Associates* had found that the statute would impose additional costs on potential customers who owned rotary phones because they would need to purchase equipment so that the phone could utilize the access code. *Id.* at 786. The cost of the equipment ranged from $19.95 to $29.95. *Id.* The Court of Appeals observed that while this may not seem overly burdensome, the "First Amendment is not available 'merely to those who can pay their own way.'" *Id.* at 787 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S. Ct. 870, 87 L.Ed. 1292 (1943)). The court noted that this cost may be a deterrent to some users who may call the services on impulse or too infrequently to justify the extra cost. *Id.* at 787.

In *Reno I*, in determining whether the CDA imposed a burden on constitutionally protected adult speech, the Supreme Court adopted the district court's finding that "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." 521 U.S. 844, 117 S. Ct. 2329, 2347, 138 L.Ed.2d 874 (1997). The district court also found that there was "no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." *Id.* The Supreme Court noted that this limitation, as well as the prohibitively high economic burden of age verification for some sites, "must inevitably cur-

tail a significant amount of adult communication on the Internet." *Id.*

Much of the evidence and argument at the preliminary injunction hearing here focused on the economic costs that would be imposed on Web site operators and content providers, and particularly the plaintiffs in this action, in complying with COPA, including out-of-pocket costs of implementing the affirmative defenses, loss of revenue and potential closure of Web sites that could occur, and the ability of specific plaintiffs to shoulder these economic costs as incremental costs of running a commercial Web site. The defendant argues that the economic and technological burden imposed by COPA is not substantial and does not impose an unreasonable economic burden on Web site operators.

The economic costs associated with compliance with COPA are relevant to the Court's determination of the burden imposed by the statute. However, even if this Court should conclude that most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult verification screens, such conclusion is not dispositive. First Amendment jurisprudence indicates that the relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs, or of other Web site operators and content providers not before the Court. The protection provided by the First Amendment in this context is not diminished because the speakers affected by COPA may be commercial entities who speak for a profit. "The government's power to impose content-based financial disincentives on speech surely does not vary

with the identity of the speaker." *See Simon & Schuster*, at 117, 112 S. Ct. 501. Strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of protected speech from the marketplace of ideas.

In assessing the burden placed on protected speech by COPA, it is necessary to take into consideration the unique factors that affect communication in the new and technology-laden medium of the Web. Each medium of expression "must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). For example, the plaintiffs have presented evidence that the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, or how old the users are, unless they take affirmative steps to gather information from the user and the user is willing to given them truthful responses. In the same vein, it can be inferred that any barrier that Web site operators and content providers construct to bar access to even some of the content on their sites to minors will be a barrier that adults must cross as well.

Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications. (Finding of Fact ¶¶ 61-62). The plaintiffs are likely to establish at trial that under

COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. (Finding of Fact ¶ 59). This has the effect of burdening speech in these fora that is not covered by the statute. I conclude that based on the evidence presented to date, the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults. The Court's analysis then turns to the likelihood of plaintiff's ability to make a successful showing that the statute is narrowly tailored to a compelling government interest.

3. ***Compelling Government Interest***

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See Sable*, 492 U.S. at 126, 109 S. Ct. 2829 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). There is nothing in the legislative history of COPA that indicates that the intention of Congress was anything but the protection of minors. Congress recognized that the Web is widely accessible to minors and pornography is widely available on the Web. *See* H.R. Rep. No.105-775 at 9-10. Congress

expressed that its intent in COPA was to require "the commercial pornographer to put sexually explicit messages 'behind the counter'" on the Web, similar to existing requirements in some states that such material to be held behind the counter or sold in a paper wrapper in a physical store. *Id.* at 15.

4. ***Narrow Tailoring and Least Restrictive Means***

While the plaintiffs have the burden in the context of the motion for preliminary injunction of showing success on the merits of their claims, the defendant ultimately will bear the burden of establishing that COPA is the least restrictive means and narrowly tailored its objective, which the defendant argues is the regulation of commercial pornographers. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). In *Elrod*, the Supreme Court described "least restrictive means" by stating that "if the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id.* at 363, 96 S. Ct. 2673. Further, to survive constitutional challenge the statute "must further some vital government end by a means that is least restrictive of [First Amendment freedoms] in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.*

In *Simon & Schuster*, 502 U.S. 105, 121, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991), the Supreme Court, in holding that the "Son of Sam" law, which restricted the ability of a person who had committed a crime to profit by writing about it, was significantly overinclusive and thus not narrowly tailored, noted "that had the law been in effect at the time and place of publication, it

would have escrowed payment for such works as *The Autobiography of Malcolm X*, . . . *Civil Disobedience*, . . . even the *Confessions of St. Augustine*." While the Court recognized that this argument was "hyperbole," the Court noted that the law clearly reached a wide range of literature that was outside the scope of the statute's interest. *Id.* at 122, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit upheld the district court's finding that a less restrictive means was available other than requiring access codes because calls to dial-a-porn could be pre-blocked until a customer requested otherwise. *Id.* at 787. The court held that even if some chill was associated with pre-blocking, it did not entail additional costs to the user nor did it require that the message provider purchase new equipment and absorb increased operating costs. *Id.* at 788.

The *Fabulous Associates* court rejected the Commonwealth's argument that central blocking was not as effective as the access code requirement of the statute because minors with phone lines could request unblocking or gain access to unblocked phones, or that a parent who chooses to unblock his phone for the parent's use would place the dial-a-porn messages within the reach of minors. *Id.* at 788. The court noted that "[i]n this respect, the decision a parent must make is comparable to whether to keep sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent." *Id.*

In evaluating the proposed less restrictive means, the court acknowledged that some minors will access

the dial-a-porn message if they are determined to do so; however, the court noted that preventing "'a few of the most enterprising and disobedient young people'" from obtaining access to these messages did not justify a statute that had the "'invalid effect of limiting the content of adult telephone conversations to that which is suitable for children.'" *Id.* at 788 (quoting *Sable Communications v. FCC*, 492 U.S. 115, 109 S. Ct. 2829, 2838, 2839, 106 L.Ed.2d 93 (1989)).

Here, this Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal. Moreover, there is some indication in the record that minors may be able to legitimately possess a credit or debit card and access harmful to minors materials despite the screening mechanisms provided in the affirmative defenses. *See Reno I*, 117 S. Ct. at 2349 (noting that "[e]ven with respect to the commercial pornographers that would be protected by the defense[s] [provided in the CDA], the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults"). These factors reduce the benefit that will be realized by the implementation of COPA in preventing minors from accessing such materials online.

On the record to date, it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to this material. Of course, the final determination must await trial on the merits. The plaintiffs suggest that an

example of a more efficacious and less restrictive means to shield minors from harmful materials is to rely upon filtering and blocking technology.[6] Evidence was presented that blocking and filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks. However, there was also evidence that such software blocks certain sources of content that COPA does not cover, such as foreign sites and content on other protocols. (Finding of Fact ¶ 66). The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means.

Beyond the debate over the relative efficacy of COPA compared to blocking and filtering technology, plaintiffs point to other aspects of COPA which Congress could have made less restrictive. Notably, the sweeping category of forms of content that are prohibited—"*any communication*, picture, image, graphic image file, article, recording, *writing*, or *other matter of any kind*" (emphasis added)—could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instance, only pictures, images, or

[6] The plaintiffs do not argue that Congress should statutorily require the use of such technology to shield minors from such materials.

graphic image files, which are typically employed by adult entertainment Web sites as "teasers." In addition, perhaps the goals of Congress could be served without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines, for communicating speech that is protected as to adults or without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them instead of incorporating the substance of the affirmative defenses in the elements of the crime.

B. *Irreparable Harm*

The plaintiffs have uniformly testified or declared that their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution, and this Court has concluded in the resolution of the motion to dismiss that such fears are reasonable given the breadth of the statute. Such a chilling effect could result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72,73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that is protected for adults under the First Amendment, which also constitutes irreparable harm.

C. *Balance of Interests*

In deciding whether to issue injunctive relief, this Court must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court may ultimately rule on the merits of plaintiffs' claims at trial.

VII. *Conclusion*

The protection of children from access to harmful to minors materials on the Web, the compelling interest sought to be furthered by Congress in COPA, particularly resonates with the Court. This Court and many parents and grandparents would like to see the efforts of Congress to protect children from harmful materials on the Internet to ultimately succeed and the will of the majority of citizens in this country to be realized through the enforcement of an act of Congress. However, the Court is acutely cognizant of its charge under the law of this country not to protect the majoritarian will at the expense of stifling the rights

embodied in the Constitution. Even at this preliminary stage of the case, I borrow from Justice Kennedy, who faced a similar dilemma when the Supreme Court struck down a statute that criminalized the burning of the American flag:

> The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.
>
> The hard fact is that sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Texas v. Johnson, 491 U.S. 397, 420, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring).

Despite the Court's personal regret that this preliminary injunction will delay once again the careful protection of our children, I without hesitation acknowledge the duty imposed on the Court and the greater good such duty serves. Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.

Based on the foregoing analysis, the motion to dismiss the plaintiffs for lack of standing will be denied.

Based on the foregoing findings and analysis, the Court concludes that the plaintiffs have established a likelihood of success on the merits, irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute pending a trial on the merits, and the motion of plaintiffs for a preliminary injunction will be granted.

An appropriate Order follows.

ORDER

AND NOW, this 1st day of February, 1999, upon consideration of the motion of plaintiffs for a preliminary injunction and supporting brief (Document No. 73), the response of the defendant (Document No. 82), and the supplemental reply brief of the plaintiffs (Document No. 74), as well as the exhibits, declarations, and other evidence submitted by the parties, having held a hearing on this motion in which counsel for both sides presented evidence and argument, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **PRELIMINARILY ENJOINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of

the Child Online Protection Act at any time[7] for any conduct[8] that occurs while this Order is in effect. This

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[7] As noted by this Court in the Order granting the plaintiffs' motion for a temporary restraining order on November 19, 1998, it appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

[8] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American*

Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[9]

IT IS FURTHER ORDERED that this preliminary injunction shall remain in effect until a final adjudication of the merits of plaintiffs' claims has been made.

IT IS FURTHER ORDERED that, upon consideration of the motion of defendant to dismiss the complaint of plaintiffs for lack of standing (Document No. 50), the response of plaintiffs (Document No. 69), and the reply thereto (Document No. 81), for the reasons set forth in the accompanying Memorandum, the motion is **DENIED**.

Booksellers Association, 484 U.S. 383, 392, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[9] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

Filed: Nov. 23, 1998

MEMORANDUM

Reed, J. **November 20, 1998**

The plaintiffs, representing individuals and entities who are speakers and content providers on the World Wide Web (the "Web"), many of whom are seeking to make a profit, and users of the Web who use such sites, filed a complaint in this Court challenging the constitutionality of the recently enacted Child Online Protection Act ("COPA") under the First and Fifth Amendments.[1] The plaintiffs allege in their complaint that COPA infringes upon protected speech of adults and minors and that it is unconstitutionally vague. The plaintiffs sought a temporary restraining order to

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[1] This Court has jurisdiction under 28 U.S.C. § 1331.

prohibit the Attorney General from enforcing COPA, which was to go into effect on November 20, 1998. *See* Attachment A. This memorandum sets forth pursuant to Federal Rule of Civil Procedure 65(d) the reasons for the issuance of the temporary restraining order yesterday. (Document No. 29).

COPA represents the efforts of Congress to remedy the constitutional defects in the Child Decency Act ("CDA"), the first attempt by Congress to regulate content on the Internet. The CDA was struck down by the Supreme Court in *ACLU v. Reno*, 117 S. Ct. 2329 (1997) as violative of the First Amendment. Resolution of the motion for temporary restraining order is the first stepping stone in determining the constitutionality of COPA.

To obtain a temporary restraining order, the plaintiffs must prove four elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the TRO issues than to the plaintiffs if the TRO does not issue; and (4) that the public interest, if any, weighs in favor of plaintiff. *See Drysdale v. Woerth*, 1998 WL 647281, *1 (E.D. Pa.) (citing *Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998)). The plaintiffs need not prove their whole case to show a likelihood of success on the merits. If the balance of hardships tips in favor of plaintiffs, then the plaintiffs must only raise "'questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.'" *ACLU v. Reno I*, 1996 WL 65464, *2 (E.D. Pa.) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

For the purposes of the resolution of this motion for a temporary restraining order, I assume that strict scrutiny should be applied to COPA to determine if it is narrowly tailored to achieve a compelling governmental interest.[2] *See ACLU v. Reno*, 117 S. Ct 2329, 2344 (1996) (concluding that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). In addition, the parties are in agreement that the "harmful to minors" speech described in COPA is protected speech as to adults.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Id.* at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve these compelling interest must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *Id.* at 127 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (reversing a conviction under a statute which made it an offense to

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[2] The government asserts in its brief that the statute may be subject to the lower level of scrutiny which has been applied to "commercial speech;" however, the government did not press that position for the purposes of the temporary restraining order at the hearing.

make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See id.* at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)). Thus, the issue for which the plaintiffs must show a likelihood of success on the merits is whether COPA is narrowly tailored to this interest. The defendant argued that COPA on its face is not a total ban on speech that is protected for adults because commercial communicators may avail themselves of the affirmative defenses to prosecution. The plaintiffs argue that COPA is not narrowly tailored to this legitimate, compelling interest because the affirmative defenses provided by the statute are technologically and economically unavailable to many of the plaintiffs and overly burdensome on protected speech. The plaintiffs further argue that speech that is protected as to adults will be chilled on the Web and COPA in effect will reduce the content of the Web to the level of what is acceptable for minors. Therefore, the plaintiffs argue, COPA unconstitutionally infringes upon speech that is protected as to adults.

A statute which has the effect of deterring of speech, even if not the total suppression of the speech, is a restraint on free expression. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.8 (1975) (considering the expense of erecting a wall around appellant's drive-in theater in determining whether an ordinance prohibiting public display of films containing nudity was narrowly tailored) (citing *Speiser v. Randall*, 357 U.S.

513 (1958)). The Court in *Erznoznik* noted that the regulation on speech at issue left the plaintiff "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik*, 422 U.S. at 217.

The plaintiffs presented testimony from principals of two named plaintiffs, Norman Laurila, founder and owner of A Different Light, and David Talbot, CEO and editor of Salon Magazine, from which I find that they had conducted sufficient investigations which led them to the reasonable conclusion that attempting to avail themselves of the affirmative defenses provided in COPA would cause serious and debilitating effects on their businesses. Based on the evidence before me, I am satisfied that plaintiffs have raised serious and substantial questions as to the technological and economic feasibility of these affirmative defenses. (Testimony of Laurila; Testimony of Talbot). At least one other plaintiff reached the same conclusion. (Declaration of Barry Steinhardt).[3] Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults. Thus, I am satisfied that plaintiffs

[3] The defendant objected to certain statements made by declarants which contained hearsay or lacked foundation. To the extent that any of the declarations contained statements that contained hearsay or lacked foundation, those statements were not relied on by the Court; the declarations submitted by the plaintiffs were only received for the purpose of determining whether the declarant conducted an investigation which lead him to a reasonable conclusion about the effect on his business of complying with COPA.

have shown a likelihood of success on the merits on their claim that COPA violates the First Amendment rights of adults.[4]

The defendant notes that "it is far from clear that plaintiffs have standing" to pursue this litigation. (Def.'s Brief at 11). However, the defendant has suggested that for purposes of disposition of the motion for temporary restraining order, the Court should assume that some of the plaintiffs are entities covered by COPA that engage in activities regulated by COPA. (Def.'s Proposed Conclusions of Law ¶ 2). In addition, the Court concludes that for purposes of the temporary restraining order, the plaintiffs have raised serious and substantial questions as to whether some of the materials posted on their Web sites are covered by the Act as material harmful to minors.

Because the plaintiffs have established to the satisfaction of the Court a likelihood of success on the merits of their challenge, they clear the remaining legally imposed hurdles to injunctive relief with ease.

The plaintiffs have persuaded me that at least with respect to some plaintiffs, their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an

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[4] This opinion does not purport to address the myriad of arguments presented by both sides, nor to address each of the grounds presented by the plaintiffs for invalidating the statute. Those arguments and claims will be dealt with by the Court at a later time to the extent that they are necessary to a full resolution of this case.

irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69 at 72, 73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

In deciding whether to issue injunctive relief, I must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court, with the benefit of a fuller factual record and thorough advocacy from the parties, may more closely examine the constitutionality of this statute.

Based on the foregoing findings and conclusions that the plaintiffs have established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute, the

motion for a temporary restraining order was granted in an Order dated November 19, 1998 (Document No. 29), a copy of which is attached to this Memorandum as Attachment B.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

ATTACHMENT A

Excerpts from the Child Online Protection Act

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY.-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. §231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

> or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231 (c) provides that:

> (c) AFFIRMATIVE DEFENSE.—
>
> (1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

ATTACHMENT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the motion of plaintiffs for a temporary restraining order, the response of the defendant, the exhibits and declarations submitted by the parties, having held a hearing on this date in which counsel for both sides presented evidence and argument, and having found and concluded, for the specific reasons required under Federal Rule of Civil Procedure 65(b) set forth in a Memorandum to be issued forthwith, that plaintiffs have shown (1) a likelihood of success on the merits of at least some of their claims, (2) that they will suffer irreparable harm if a temporary restraining order is not issued, and (3) that the balance of harms and the public interest weigh in favor of granting the temporary restraining order, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney

General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **TEMPORARILY RESTRAINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time[1]

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[1] It appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

for any conduct[2] that occurs while this Order is in effect. This Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[3]

IT IS FURTHER ORDERED that this temporary restraining order shall remain in effect for ten days which, calculated according to Federal Rule of Civil Procedure 6(a), expires on Friday, December 4, 1998.

The Court may modify this Order as the ends of justice require.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

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[2] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American Booksellers Association*, 484 U.S. 383, 392 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[3] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

Section 231 note of Title 47 of the United States Code (Supp. IV 1998) Congressional Findings provides as follows:

CONGRESSIONAL FINDINGS

Pub. L. 105-277, div. C, title XIV, § 1402, Oct. 12, 1998, 112 Stat. 2681-736, provided that: "The Congress finds that—

"(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

"(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

"(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

"(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

"(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the internet."

APPENDIX D

Section 231 of Title 47 of the United States Code (Supp. IV 1998) provides as follows:

Restriction of access by minors to materials commercially distributed by means of World Wide Web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a) of this section, a person shall not be considered to make any communication for commercial purposes to the extent that such person is—

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to ~~m~~minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a) of this section—

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) of this section may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection,[1] the following definitions shall apply:

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or

[1] So in original. Probably should be "section,".

principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

(5) Internet information location tool

The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes

directories, indices, references, pointers, and hypertext links.

(6) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION;
ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT
LIGHT BOOKSTORES; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;
ADDAZI INC. D/B/A CONDOMANIA;
ELECTRONIC FRONTIER FOUNDATION;
ELECTRONIC PRIVACY INFORMATION CENTER;
FREE SPEECH MEDIA; INTERNET CONTENT
COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;
POWELL'S BOOKSTORE; RIOTGRRL;
SALON INTERNET, INC.; WEST STOCK, INC.;
PLANETOUT CORPORATION

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

On Appeal From The United States District Court For
The Eastern District Of Pennsylvania

[Filed: Sept. 15, 2000]

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES and GARTH*, *Circuit Judges*

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

Judge Alito would have granted rehearing en banc.

IT IS SO ORDERED.

By the Court,

/s/ signature illegible
United States Circuit Judge

DATE: SEP 15 2000

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* Judge Garth's vote is limited to panel rehearing only.

(2)

SUPREME COURT, U.S.
FILED
APR 16 2001

No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the criminal provisions of a federal law, the Child Online Protection Act, 47 U.S.C. § 231, violate the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Book Stores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; Blackstripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; Internet Content Coalition; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Internet, Inc.; and West Stock, Inc., now known as ImageState North America, Inc.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent ArtNet Worldwide Corporation is ArtNet AG.

2) Approximately 30% of the stock of respondent OBGYN.net is owned by MediOne, Inc., an affiliate of Medison Co., Ltd.

3) The parent corporation of respondent Philadelphia Gay News is Masco Communications.

4) Approximately 17% of the total number of shares issued and outstanding, including warrants and options, of respondent PlanetOut Corporation is owned by AOL Time Warner Inc.

5) The parent corporation of respondent West Stock, Inc., which has been renamed ImageState North America, Inc., is Convergence Holdings, PLC.

6) The following respondents do not have parent companies nor do any publicly held companies own ten percent or more of their stock: Addazi Inc. d/b/a Condomania, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Androgyny Books, Inc. d/b/a A Different Light Book Stores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, Powell's Bookstore, RiotGrrl, and Salon Internet, Inc.

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In the Supreme Court of the United States

No. 00-1293

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,
v.
AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents American Civil Liberties Union, et al., hereby submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231, was signed into law on October 21, 1998. The next day, respondents filed this suit in the United States District Court for the Eastern District of Pennsylvania, alleging, *inter alia*, that COPA violated the First Amendment to the Constitution. Respondents sought an injunction to prevent its enforcement.

A. The District Court's Decision And Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA, which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make [] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The findings describe the character and the dimensions of the Internet, the nature of the speech at risk under the law, the inability to verify the age and geographic location of Internet users and the effect of the law on speakers and adult readers. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) ("*ACLU I*"), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223, and held that "it would be prohibitively expensive for . . . some commercial[] speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet." *Id.* at 877 (citation omitted); *see also* Appendix to Petition for a Writ of Certiorari ("App.") 80a, 81a, 89a. Petitioner has not disputed the district court's findings either on appeal or in this petition, and some of those findings were derived from a joint stipulation submitted by the parties. *See* App. 55a-82a. Based on this record, the district court held that respondents were likely to succeed on their claim that COPA violates the First Amendment because "COPA imposes a burden on speech that is protected for adults," App. 90a, and because the government could not prove that

COPA is the "least restrictive means available to achieve the goal of restricting the access of minors to [harmful to minors] material," App. 93a.

1. Respondents And Their Speech Affected By COPA

Respondents include a diverse range of individuals, entities, and organizations, ranging from "new media" online magazines to long-established booksellers and large media companies. All respondents use the World Wide Web (the "Web") to provide information on a variety of subjects, including sexually oriented issues that they fear could be construed as "harmful to minors." *See* App. 63a-67a, ¶¶21, 24-26.

Respondents and their users post, read and respond to content on the Web including visual art and poetry; information about obstetrics, gynecology, and sexual health; books and photographs; online magazines; and resources designed for gays and lesbians. *See* App. 63a, ¶ 21. For example, Dr. Mitchell Tepper operates the Sexual Health Network Web site, which provides easy access to information about sexuality geared toward individuals with disabilities, including advice on sexual surrogacy and how to experience sexual pleasure. *See* App. 65a, ¶ 25. Salon Magazine is a leading online magazine featuring articles on current events, the arts, politics and sexuality. Salon publishes a regular column entitled "Sexpert Opinion" by author and sex therapist Susie Bright. *See* Court of Appeals Joint Appendix ("J.A.") 139-40, 617-41. Several respondents host Web-based discussion groups and chat rooms that allow readers to converse on various subjects. *See* App. 63a, ¶ 22.

Like the vast majority of speakers on the Web, respondents provide virtually all of their online information for free. *See* App. 63a, ¶ 23. Like traditional newspapers

and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See* App. 68a-69a, ¶ 33; 47 U.S.C. § 231(e)(2)(B). Although certain respondents are large, well-known Web publishers, others are start-up operations run by single individuals. *See, e.g.*, App. 65a; J.A. 139-40.

2. The Impact Of COPA On Communication On The Web

Currently, approximately one third of the 3.5 million sites on the Web are commercial within the meaning of COPA in that their operators "intend to make a profit." App. 67a, ¶ 27. Because "[t]he best way to stimulate user traffic on a Web site is to offer some content for free to users . . . virtually all Web sites offer at least some free content." App. 69a, ¶ 34. The "vast majority of information . . . on the Web . . . is provided to users for free." App. 63a, ¶ 23. It is generally not possible for a Web speaker to verify the age or geographic location of a person accessing the speaker's content. *See* App. 62a, ¶ 18; App. 89a.

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* App. 70a-71a, ¶ 37; App. 111a. The district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." App. 70a-71a, ¶ 37. Further, there are "no other reasonable measures" available to restrict access to minors. *Id.* Thus, the uncontested evidence showed that the only technologies currently available for compliance

with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity before gaining access to restricted content. *Id.*

The essential problem with either option, as the district court found, is that requiring Web users to register or pay before accessing a site would deter adult users from accessing that site, thus impermissibly burdening First Amendment rights. *See* App. 65a-67a, ¶¶25-26; 89a. Because almost all content on the Web is available without the need to register and provide personal information, Web users are reluctant to provide such information to Web sites. *See* App. 63a, ¶ 23; 69a, ¶ 35; 70a, ¶ 36. Users "will only reveal credit card information at the time they want to purchase a product or service." App. 70a, ¶ 36. For this reason, Web sites that have required registration or payment before granting access "have not been successful." *Id.*

Respondents testified that any mandatory registration would drive away their users. *See* J.A. 330-31, 344, 367-68, 370. For example, Dr. Tepper testified that persons who access the Sexual Health Network "have already been too embarrassed or ashamed to ask even their doctor. I think if they come across this barrier to access, that they are just not going to take the next step and put their name and credit card information in." J.A. 344.

In addition, to utilize COPA's credit card defense, a content provider "would need to undertake several steps," App. 72a, ¶ 41, with start-up costs ranging from "approximately $300 . . . to thousands of dollars. . . ." App. 72a, ¶ 42. The district court found that "it was not clear from the conflicting testimony" whether credit card verification services will authorize or verify a credit card number in the absence of a financial transaction. App. 73a,

¶ 45. Without such a service, a content provider would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129. Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. *See* App. 73a, ¶ 45. Such per-authorization fees would allow users hostile to certain content to drive up costs to the provider by repeatedly accessing restricted content. *See* J.A. 133.

Petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora." App. 79a, ¶ 58. Web-based interactive fora are inherently dynamic, and there is no way to prohibit access to some materials "and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.* Respondents testified that these interactive fora are important in attracting users to their Web sites. *See* J.A. 221.

Finally, COPA's credit card and adult access defenses would require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that this could be prohibitively expensive, and, in some cases, would require respondents to shield even some materials not "harmful to minors" behind age verification screens. As the district court recognized, the technological requirements for implementing credit card or adult access code verification to comply with COPA could be substantial – depending on the amount of content on a Web site, the amount of content that may be "harmful to minors," the degree to which a Web site is organized into files and directories, the degree to which "harmful to minors" material is currently segregated into a particular file or

directory and the level of expertise of the Web site operator. *See* App. 71a, ¶ 39; App. 78a, ¶ 56. COPA would require some Web sites to reorganize and redesign literally millions of files. *See* J.A. 158-59. A content provider also would have to reorganize individual files and pages in order to restrict only content that could be "harmful to minors". *See* App. 77a, ¶ 54. In addition, even a single page of Web content could have some content prohibited under COPA and some that was not, making it difficult if not impossible to segregate such content. *See* App. 77a-78a, ¶ 55.

In sum, the district court concluded that "the implementation of credit cards or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." App. 89a.

3. User-Based Filtering Programs

In contrast to the burden imposed by COPA, user-based filtering software constitutes a less restrictive and more effective alternative. As the district court found, COPA does not even reach a substantial portion of material posted on the Web that may be "harmful to minors." COPA does not restrict the wide range of "harmful to minors" materials provided noncommercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *See* App. 93a. In addition, at least forty percent of Web content originates abroad, and this material may be accessed by minors as easily as content that originates locally. *See* App. 62a, ¶ 20. In contrast, even the government's expert conceded that user-based blocking software can block these materials, in addition to blocking Web-based commercial materials. *See* App. 81a-82a, ¶ 65. Thus, even recognizing the flaws of user-based blocking

software, it is at least equally effective and less restrictive than COPA's criminal penalties.

B. The Court Of Appeals' Ruling

On appeal, the United States Court of Appeals for the Third Circuit upheld the district court's ruling that COPA violates the First Amendment, *see* App. 3a, and specifically accepted the district court's factual findings, *see* App. 12a.

The court of appeals affirmed on other grounds and did not reach issues addressed by the district court. *See* App. 21a, n.19. The court of appeals did not reject the district court's rationale, but rather held that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." App. 3a.

SUMMARY OF THE ARGUMENT

Like the CDA, which this Court unanimously struck down in *ACLU I*, COPA threatens protected speech with criminal sanctions and effectively suppresses a large amount of speech that adults have a constitutional right to communicate and receive on the Web. Recognizing that the Internet is a powerful "new marketplace of ideas" and "vast democratic for[um]" that is "dramatic[ally] expand[ing]" in the absence of government regulations, this Court has imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech. *ACLU I*, 521 U.S. at 868, 870, 885. COPA, like the CDA, fails this scrutiny.

COPA's criminal penalties apply to millions of commercial content providers whose communications on the Web "include[] any material that is harmful to minors" –

even a single description or image on a Web page. Respondents' threatened speech includes, for example, Andres Serrano photographs, sexually explicit poetry, interactive chats educating disabled persons on how to experience sexual pleasure, news stories about the Monica Lewinsky episode and an online radio show for gays and lesbians called "Dr. Ruthless." *See* J.A. 606-07, 634-37, 656, 672-79, 709-13. COPA violates the First Amendment because there is still no effective way to prevent minors from obtaining prohibited speech without also deterring and burdening access by adults. *See ACLU I*, 521 U.S. at 876-77; App. 89a, 95a. In addition, COPA would force online speakers to abide by the standards of the most conservative community for determining what is "harmful to minors." *See ACLU I*, 521 U.S. at 877-78; App. 29a. Because COPA suffers from the same fundamental defects that led the Court to strike down the CDA, this case does not merit the Court's review.

REASONS FOR DENYING THE WRIT

I. BECAUSE COPA CONTAINS THE SAME DEFECTS AS THE CDA, WHICH THIS COURT HAS ALREADY FOUND UNCONSTITUTIONAL, THIS CASE DOES NOT MERIT REVIEW

A. COPA Contains The Same Defects That Caused This Court To Hold That The CDA Was Unconstitutional

COPA suffers from the very same fundamental defects that caused this Court to strike down the CDA as unconstitutional. Both statutes, in their attempt to deny minors access to certain speech, "effectively suppress[] a large amount of speech that adults have a constitutional right to receive and to address to one another" and are therefore unconstitutionally overbroad. *ACLU I*, 521 U.S.

at 874. Petitioner has not identified a Circuit split or any other "compelling reason[]," Sup. Ct. R. 10, why this Court should revisit these same issues just four years later.

Both the CDA and COPA are criminal statutes, which pose a very strong risk that they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU I*, 521 U.S. at 872; App. 95a. Both apply to speech that is constitutionally protected for adults. Both effectively prevent adults from accessing speech because there is no way to prevent minors from obtaining communications on the Web without also deterring and burdening access by adults. *See ACLU I*, 521 U.S. at 876-77; App. 89a, 95a. In addition, because both laws impose "community standards" on a medium that knows no geographical boundaries, both laws allow "any communication available to a nationwide audience [to] be judged by the standards of the community most likely to be offended by the message." *ACLU I*, 521 U.S. at 877-78; App. 29a.

This Court has repeatedly held that content-based regulations, such as the relevant provisions of the CDA and COPA, are subject to strict scrutiny and are presumptively unconstitutional. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 391 (1992). As the Court explained in *ACLU I*, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this [Internet] medium." 521 U.S. at 870. Accordingly, such regulations must be justified by a compelling governmental interest and be narrowly tailored to effectuate that interest, *i.e.*, there must be no less restrictive alternative to achieve that compelling interest. *See id.* at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

In *ACLU I*, this Court applied strict scrutiny and held that the CDA was unconstitutional because it was not narrowly tailored and would suppress non-obscene speech that this Court has found constitutionally protected for adults. *See id.* ("[s]exual expression which is indecent but not obscene is protected by the First Amendment") (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The Court emphasized, among other facts, the district court's findings that "at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults" and that "[a]s a practical matter . . . it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults." *ACLU I*, 521 U.S. at 876-77.

COPA suffers from these same defects. There is still no way for a speaker to prevent minors from obtaining access to its Web communications without deterring adult users. *See* App. 89a-90a, 95a. Accordingly, both statutes effectively force speakers to withhold their speech from adults as well as minors. COPA's affirmative defenses, which are nearly identical to defenses found insufficient in the CDA, do not solve this problem. The district court's undisputed findings establish that it is as true today as when this Court reviewed the CDA that there is no way to verify age in interactive fora without restricting access to all speech. *See infra* § II(A). It is still prohibitively expensive for respondents to use the only technologically feasible method for verifying age. *See infra* § II(B). Finally, COPA – like the CDA – improperly relies on "community standards" to define the ambit of its reach. *See ACLU I*, 521 U.S. at 877-78; *see also infra* § III.

COPA thus suffers from the same fundamental overbreadth that rendered the CDA invalid. By sweeping

in material that is unquestionably protected for adults, COPA, like the CDA, impermissibly "'burn[s] the house to roast the pig.'" *ACLU I*, 521 U.S. at 882 (quoting *Sable*, 492 U.S. at 127).

B. None Of The Alleged Differences Between COPA And The CDA Raise Any Novel Issues Warranting This Court's Review

Petitioner's efforts to avoid the clear implications of this Court's decision in *ACLU I* by attempting to distinguish COPA from the CDA, *see* Petition for a Writ of Certiorari ("Pet.") 6-8, 15-18, are unavailing. None of the differences between the two statutes have any constitutional significance.

For example, petitioner stresses that COPA applies only to material communicated through the Web whereas the CDA applied to all forms of communication on the Internet. *See* Pet. 6. But there is no question that COPA (like the CDA) bans a staggering amount of constitutionally protected communications between adults. Furthermore, many interactive fora such as chat rooms and discussion groups have now become Web-based. *See* App. 59a, ¶ 9. COPA applies to these millions of communications, effectively banning protected speech in them because there is no way to determine the age of users. *See* App. 79a, ¶ 58.[1]

Likewise, although COPA purportedly restricts only speech provided "for commercial purposes," *see* Pet. 7, it effectively covers any speech provided for free on the Web

[1] Although COPA, unlike the CDA, at least attempts to track the "harmful to minors" standard this Court approved in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968), this flaw in the CDA was not the basis for the Court's holding in *ACLU I*; rather, the Court found the CDA unconstitutional because, like COPA, it censored communications protected by the Constitution for adults.

by a commercial entity, not merely speech that proposes a commercial transaction. COPA sweeps in any individual or organization communicating with the objective of making a profit, whether by promoting and selling products over the Web or by selling space to advertisers or members.[2] COPA's restrictions thus include speech that is clearly subject to the highest level of First Amendment protection, such as poems, artwork and articles in Web magazines. *See* App. 52a-53a. The fact that the speakers may ultimately profit from their communications is constitutionally irrelevant. Indeed, any theory that the level of constitutional protection afforded to speech depends upon whether the speaker has a "commercial purpose" would reverse longstanding precedents protecting communications such as newspaper articles and literary works. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

[2] COPA applies broadly on its face to *any* Web site that, in the regular course of business, communicates any speech that "includes any material that is harmful to minors." 47 U.S.C. § 231(e)(2)(B). The district court noted the broad scope of COPA, stating: "the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that *includes any material* that is harmful to minors,' and defines a speaker that is engaged in the business as one who makes a communication 'that *includes any material* that is harmful to minors ... as a regular course of such person's trade or business (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).'" App. 52a. (emphasis in original).

II. EVEN IF THIS COURT HAD NOT ALREADY RULED THAT AN ESSENTIALLY IDENTICAL STATUTE IS UNCONSTITUTIONAL, REVIEW WOULD BE UNNECESSARY BECAUSE COPA IS CLEARLY OVERBROAD

A. The Inability To Verify Age On The Web Renders COPA Overbroad

Even if this Court had not already decided the constitutionality of a substantially identical statute, review would be unwarranted here because COPA's criminal penalties on protected speech are clearly unconstitutional under this Court's well-established precedent. *See, e.g., Sable*, 492 U.S. at 131 (invalidating a conviction for distribution of indecent publications); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (invalidating a conviction for distribution of indecent publications).

As noted above, an inherent characteristic of the Web is that there is essentially no way to tell whether a Web user is a minor or an adult. Thus, it is not technologically possible for speakers on the Web to verify the age of a recipient who accesses their communications online. *See* App. 89a. There is no effective method for a sender to prevent minors from obtaining access to its communications on the Web without also deterring adults from accessing its communications. *See* App. 89a – 90a, 95a.

In addition, COPA requires Web-based interactive chat rooms and discussion groups to restrict speech that is not even covered by the statute. "[T]he uncontroverted evidence showed that there is no way to restrict the access

of minors to harmful materials in chat rooms and discussion groups...without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. This has the effect of burdening speech in these fora that is not covered by the statute." App. 90a (citation omitted).

COPA's threat of prosecution, and burden on protected speech, violate the First Amendment, and are far more onerous than many speech restrictions struck down by this Court. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (striking down law requiring cable operators to scramble sexually oriented programming); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (invalidating statute requiring cable operators to block certain cable channels).

B. COPA's Affirmative Defenses Do Not Save The Statute, Because They Will Prevent Or Deter Adult Web Users From Accessing A Wide Range Of Protected Speech

COPA provides affirmative defenses for "good faith" efforts to restrict access by minors to material that is "harmful to minors," such as by requiring the use of a credit card or adult access code. *See* 47 U.S.C. § 231(c)(1)(A). However, as the district court noted, "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter [adult] users from accessing such materials." App. 89a. If Web providers utilize either COPA's adult access code or credit card defenses, Web users would be required to provide identifying information, perhaps to an untrusted third-party Web site, before accessing protected speech. *See* J.A. 379. As a result, COPA will deter adults from accessing

restricted content because Web users are simply unwilling to provide identifying information in order to gain access to content. *See* App. 89a-90a; J.A. 330-31, 344, 367-68, 370 (customers would simply forgo accessing respondents' material entirely if forced to apply for an adult access code, provide a credit card number, or pay for content).

For example, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." App. 66a, ¶ 26. Tom Rielly of PlanetOut testified that "the traffic to a competitor's site which had placed its entire content behind a credit card wall and charged users $10 per month only grew to 10,000 total [members]." App. 66a, ¶ 26. By contrast, PlanetOut has 350,000 members and over two million total users have accessed the PlanetOut Web site. *See* J.A. 354-55, 368; *see also* J.A. 110-11, 134-35. David Talbot, CEO of Salon Magazine, testified that Salon Magazine does not charge for a subscription because "the people who use the Web are not inclined to pay for it." J.A. 144. Similarly, this Court found in examining the CDA that credit card and adult access code requirements would unconstitutionally inhibit adult Web browsers. *See ACLU I*, 521 U.S. at 857 n.23 ("There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.") (quoting district court).

Furthermore, COPA's threat of criminal penalties and economic disincentives will cause Web speakers to self-censor. Speakers who want to communicate "harmful to minors" materials to adults are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses. As the district court held, the result is certain to be widespread self-censorship. *See* App. 90a ("[C]ontent providers may feel an economic disincentive to engage in communications that are or may be considered to

be harmful to minors and thus, may self-censor the content of their sites."). This Court has routinely struck down economic burdens on the exercise of protected speech. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Erznoznik*, 422 U.S. at 217 (invalidating a statute that in effect required drive-in theater owners wishing to avoid prosecution either to restrict their movie offerings or construct expensive protective fencing).

Moreover, although the financial cost to content providers of implementing COPA's defenses contributes to COPA's burden on speech, the district court correctly held that the "relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the [respondents.]" App. 88a. By providing economic disincentives for Web speakers to engage in certain online communications, COPA will cause speakers to self-censor speech that is constitutionally protected. Similarly, in striking down the CDA, this Court noted that the prohibitively high economic burden of age verification "must inevitably curtail a significant amount of adult communication on the Internet." *ACLU I*, 521 U.S. at 877.

C. COPA Is Not Narrowly Tailored To Advance The Government's Asserted Interest

COPA also fails strict scrutiny because it will not even advance the government's asserted state interest. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas &*

Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980). COPA does not satisfy this test. Despite its prohibitions, it does not prevent minors from gaining access to "harmful to minors" material on foreign Web sites, on non-commercial sites, and via non-Web-based protocols. *See* App. 93a. This major flaw "demonstrates the problems this statute has with efficaciously meeting its goal." App. 93a. In fact, former Attorney General Janet Reno herself recognized this flaw of COPA. In a letter sent to Congress before COPA passed, the Attorney General stated:

> Such a diversion [of law enforcement resources] would be particularly ill-advised in light of the uncertainty concerning whether the COPA would have a material effect in limiting minors' access to harmful materials. There are thousands of newsgroups and Internet relay chat channels on which anyone can access pornography; and children would still be able to obtain ready access to pornography from a myriad of overseas web sites.

Letter Dated October 5, 1998 from Department of Justice to Honorable Thomas Bliley, Chairman of House Committee on Commerce (Pls.' Mem. of Law in Support of TRO, Ex. A) at 3.

Furthermore, the district court held that there are less restrictive alternatives to COPA. *See* App. 93a-95a. For example, parental use of blocking software is both less restrictive and more effective than COPA. Such software blocks foreign sites and content on non-Web-based protocols, as well as material from amateur or non-commercial Web sites. *See* App. 94a. As the district court held, "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access

to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." App. 94a. Although user-based blocking programs are not perfect, both because they fail to screen some inappropriate material and because they block some valuable Web sites, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than COPA's imposition of criminal penalties for protected speech among adults. *See ACLU I*, 521 U.S. at 879.

Congress itself has recognized the usefulness of such user-based blocking software through another provision enacted along with COPA, and not challenged here, that requires Internet service providers to "notify [all new customers] that parental control protections (such as computer hardware, software or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d). This Court, moreover, has specifically relied on the ability of parents to block objectionable content as "less restrictive than [government] banning." *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was a less restrictive alternative than forcing operators to scramble channels as a default); *see also Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television).[3]

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[3] *Playboy* resolves the Third Circuit's question regarding whether a parent's decision to use blocking software can constitute a less restrictive alternative. App. 15a n.16. It is also important to note that the Third Circuit *did not* reject, nor did the government challenge on appeal, the

III. REVIEW IS ALSO UNNECESSARY BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT COPA UNCONSTITUTIONALLY REQUIRES SPEAKERS ON THE WEB TO ABIDE BY THE STANDARDS OF THE MOST RESTRICTIVE COMMUNITY OR RISK CRIMINAL PROSECUTION

A. The Court Of Appeals' Reasoning Is Correct Under *Miller* And Its Progeny

Relying on the clear rulings of this Court, the court of appeals held that COPA is unconstitutionally overbroad because it subjects Web speakers across the nation to the most restrictive community's standards for what is "harmful to minors."[4] Just as the inability under COPA to verify age on the Web effectively criminalizes protected communication between adults, the inability to verify the geographic location of Web users transforms COPA's "community standards" requirement into a national mandate of the most restrictive community's standards. The government does not attempt to challenge the long-standing doctrine prohibiting a national standard, or the factual findings that inevitably led the court of appeals to conclude that COPA violates that doctrine. Because this Court recently reaffirmed that doctrine in *ACLU I*, and

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district court's factual finding that blocking software was more effective at achieving the government's interest.

[4] Respondents alleged in their complaint that COPA is unconstitutionally vague because it fails to define the relevant community that would establish the standard for what is "harmful to minors" on the global Web. *See* Complaint ¶¶26, 83, 200. Thus, despite the government's assertion to the contrary, *see* Pet. 10, this argument was not raised for the first time by the court of appeals.

because COPA is clearly unconstitutional for the other reasons discussed above, there is no reason for the Court to review this case.

In *Miller v. California*, 413 U.S. 15 (1973), this Court articulated the community standards doctrine that has governed for almost 30 years.[5] In defining the constitutionally permissible scope of speech regulation, this Court specifically adopted a *local* community standards test, and rejected the imposition of a national standard.[6] "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation." *Id.* at 30.

The language of COPA is modeled on *Miller* and attempts to impose a local community standard; it criminalizes "prurient" material as judged by "the average person, applying contemporary community standards." *Id.*

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[5] The *Miller* test is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. Though *Miller* involved the standards for judging obscene material, the local community standards test has also been applied to "harmful to minors" material. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).

[6] The prior obscenity test set out in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966), had been interpreted to impose a national standard, which the Court in *Miller* specifically rejected in favor of requiring a local standard. *See Miller*, 413 U.S. at 30-31.

at 24 (citations omitted). But the nature of the Internet effectively transforms that standard into a de facto national standard based on the most conservative community. As the district court found, Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. *See* App. 62a, ¶ 18. The government did not challenge this factual finding on appeal, *see* App. 12a; to the contrary, it stipulated to it at the preliminary injunction hearing. *See* Joint Stipulations for the Preliminary Injunction Hearing ¶ 41 ("Once a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community."). In *ACLU I*, this Court affirmed precisely the same fact. 521 U.S. at 853 (quoting district court). Practically, then, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing." *Id.* at 854 (quoting district court).

Many other lower courts have also found that the Web is not geographically constrained. *See, e.g., American Library Ass'n v. Pataki*, 969 F. Supp. 160, 166-67, 171 (S.D.N.Y. 1997); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, No. 99-2064, 2000 WL 1769592 (6th Cir. Nov. 15, 2000), *aff'g*, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

Given these undisputed facts, the court of appeals correctly ruled that COPA is overbroad because speakers could be jailed for providing content that is constitutionally protected in many communities:

> [T]o avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen -- even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

App. 24a-25a. Because speakers would be forced to conform their speech to the standards of the most restrictive communities, COPA's use of community standards deprives adults and minors of speech that they have a constitutional right to access in their own communities. *See* App. 29a.

Even Congress realized that "the applicability of community standards in the context of the Web is controversial." H.R. Rep. No. 105-775, at 27 (1998). In an attempt to sidestep this defect, petitioner relies on a purported Congressional finding to argue that the "harmful to minors" standard is reasonably constant across the United States. *See* Pet. 20-21. But as the court of appeals correctly noted, "we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors." App. 31a. Indeed, the government put on no evidence at trial to suggest that standards were constant, and "[d]eference to a

legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Sable*, 492 U.S. at 129.[7]

This Court has already recognized the constitutional implications of the inability of online speakers to prevent their speech from entering a particular community. In *ACLU I*, the Court stated that "the 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 877-78. Thus, in addition to being consistent with *Miller* and its progeny, the Third Circuit's ruling relies on this Court's reasoning in *ACLU I* and a growing body of jurisprudence that flows from it. *See Pataki, supra; Johnson, supra; Engler, supra; Chapman, supra.*

B. The Third Circuit's Reasoning Is Fully Consistent With *Hamling* And *Sable*

The government argues that subjecting the same speaker to varying standards is not unusual or unconstitutional, citing *Hamling v. United States*, 418 U.S. 87 (1974), and *Sable, supra*. *See* Pet. 12, 18, 19. As the court of appeals held, however, those cases are easily distinguishable from the present case. *See* App. 26a. *Sable* and *Hamling* involved the regulation of the actual sale of

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[7] The government also argues that the serious value prong (which is a national standard) creates a national floor, and that "a reviewing court may also enforce substantive limitations on what may be found to be 'patently offensive' with respect to minors." Pet. 22. But these arguments applied in *Miller* and its progeny as well, and the Court nonetheless held that a nationwide standard for all three prongs would be defective.

pornography by phone and through the mail, respectively. In both instances, the services were provided only to paid subscribers, and providers could simply refuse to send the material to subscribers living in more conservative geographic communities. Unlike Web speakers, then, the phone and mail providers in those cases could control the distribution of controversial material with respect to the geographic communities into which they released it. *See* App. 26a; *see also Sable*, 492 U.S. at 125-26; *Hamling*, 418 U.S. at 106. In addition, in contrast to the phone and mail services, the vast majority of speech affected by COPA is communicated free of charge on the Web, includes valuable information about sexual dysfunction, gay and lesbian resources, and art, and could be found "harmful" in some communities and valuable – even life saving – in others. *See* App. 63a, ¶¶ 21, 23.

This Court has recognized that each medium of expression is unique, and "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *see also Playboy*, 529 U.S. at 813. In contrast to speakers using other media, Web speakers cannot restrict access to their speech based on the geographic location of their users. *See* App. 26a. "'[A]n Internet user cannot foreclose access to ... work from certain states or send differing versions of ... communication[s] to different jurisdictions.... The Internet user has no ability to bypass any particular state.'" App. 26a-27a (citing *Pataki*, 969 F. Supp. at 183). Given the unique features of the Web, COPA forces Web speakers to either comply with the most stringent standard or "'[entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution.'" App. 27a (citing *Pataki*, 969 F. Supp. at 183). The court of appeals thus correctly held that COPA's reliance on local community

standards, while workable in other media, unconstitutionally restricts adults from communicating and accessing protected speech on the Web.

CONCLUSION

For all the reasons discussed above, the petition for certiorari should be denied.

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Supreme Court, U.S.
FILED
MAY 4 2001

No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals held, sua sponte, that the Child Online Protection Act's (COPA) reliance on community standards "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." Pet. App. 21a. As we explain in our petition, that constitutional ruling not only renders the entire COPA statute unenforceable; it also threatens to cripple Congress's ability to regulate material that is harmful to minors on the World Wide Web. The court's holding also conflicts with decisions of this Court. Review by this Court is therefore clearly warranted.

1. Respondents do not dispute that the court of appeals' ruling renders the entire COPA statute unenforceable. Nor do respondents argue that further proceedings in the district court are needed to render the court of appeals' ruling ripe for review by this

Court. Respondents nonetheless oppose certiorari, arguing that COPA violates the First Amendment.

That argument provides no basis for failing to grant review in this case. When a court of appeals invalidates an Act of Congress and prevents any enforcement of that Act, review by this Court is warranted on that basis alone. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress"). This Court, and not a court of appeals, should finally resolve the question whether an Act of Congress satisfies constitutional standards. This Court has repeatedly granted government petitions to review appellate court decisions that concern the constitutionality of an Act of Congress and that prevent its enforcement. The Court should grant review in this case for the same reason.

2. Review is also warranted because the court of appeals' community standards holding conflicts with this Court's decisions. In *Miller* v. *California*, 413 U.S. 15, 24, 30 (1973), the Court upheld the constitutionality of applying community standards to determine whether material appeals to the prurient interest and is patently offensive. In both *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989), the Court held that there is no constitutional barrier to requiring commercial entities whose commercial activities have effects in multiple geographic areas to bear the responsibility for complying with the standards in each geographic area. Under those cases, COPA's incorporation of community standards does not violate the First Amendment.

Respondents contend (Br. in Opp. 24-25) that *Hamling* and *Sable* apply only to situations in which commercial entities can distribute material to one geographic area without simultaneously distributing it to

others. Those decisions, however, do not depend on that precondition. Under those decisions, it is both fair and reasonable to require commercial entities that take advantage of a nationwide market for their communications to ensure that those communications are not harmful to children throughout the nation. If a commercial entity's "audience is comprised of different communities with different local standards," the commercial entity "ultimately bears the burden of complying with the prohibition on [harmful-to-minor] messages." *Sable*, 492 U.S. at 126.

Respondents assert (Br. in Opp. 22-23) that, because of the technological limitations of the World Wide Web, COPA impermissibly requires a commercial entity to comply with the standards of the most conservative community. Congress found, however, that, as applied to a national medium like the World Wide Web, the harmful to minors standard is "one that is reasonably constant among adults in America." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). Respondents cite no evidence that contradicts Congress's finding.

Respondents' argument also fails to take into account features of COPA that reinforce a "reasonably constant" harmful-to-minors standard. COPA applies only to material that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a

lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998).

Significantly, the "serious value" prong of the harmful-to-minors standard does not incorporate community standards. It therefore readily "allows appellate courts to impose some limitations and regularity * * * by setting, as a matter of law, a national floor for socially redeeming value." *Reno* v. *ACLU*, 521 U.S. 844, 873 (1997). The "appeals to the prurient interest" and "patently offensive" prongs do incorporate community standards. See *Miller*, 413 U.S. at 24, 30. Even as to those prongs, however, there remain important substantive limitations, enforceable by a reviewing court on independent review, on what falls within them. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 498-499 (1985) (holding that material appeals to the "prurient interest" when it appeals to a "shameful or morbid interest" in sex, not when it appeals to a "normal" interest in sex); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 & n.10 (1975) (material that contains nudity may be found to be harmful to minors only if it is, "in some significant way, erotic"); cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 159-161 (1974) (establishing substantive limits on what may be deemed "patently offensive" with respect to adults and stating that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive'"); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 506-507 (1984) (independent appellate review applies to determinations concerning appeal to the prurient interest and patent offensiveness). As

the House Report explains, COPA applies only to material that is "clearly pornographic"; it does not apply to "entertainment, library, or news materials that merely contain nudity or sexual information." H.R. Rep. No. 775, *supra*, at 28. Respondents simply ignore the features of COPA that narrow its coverage and serve to promote a reasonably constant harmful-to-minors standard.

Thus, this Court's decisions, Congress's findings, and the structure of COPA uniformly lead to the conclusion that the court of appeals erred in its community standards holding. That holding warrants this Court's review.

3. Respondents devote the bulk of their opposition (Br. in Opp. 9-19) to attacks on COPA that the court of appeals did not embrace. This Court may appropriately grant certiorari to decide the community standards question that the court of appeals did resolve and that we present in the certiorari petition, while leaving respondents' additional arguments to be considered by the court of appeals in the first instance. In any event, those arguments do not demonstrate that COPA is unconstitutional, much less that this Court should not grant the petition for review in this case.

a. Respondents first argue (Br. in Opp. 9-13) that there is no difference between COPA and the Communications Decency Act of 1996 invalidated in *Reno* v. *ACLU*. But as we explain in our petition (at 6-8, 17-18), COPA differs from the CDA in a number of important ways that support Congress's judgment that COPA is the least restrictive way to further the government's compelling interest in protecting children from the effects of harmful materials.

First, the CDA applied not only to communications on the World Wide Web, but to all forms of com-

munication on the Internet, including communications through e-mail, listservs, newsgroups, and chat rooms. *Reno* v. *ACLU*, 521 U.S. at 851. In contrast, COPA applies only to material posted on the World Wide Web. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, *supra*, at 12, 25. Second, the CDA applied to any material that was "indecent" or "patently offensive," without defining those terms, *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877, while COPA applies only to material that satisfies the specific three-prong standard discussed above. Third, the CDA defined a minor as any person under the age of 18. *Reno* v. *ACLU*, 521 U.S. at 865-866. In contrast, COPA, like the state law upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), defines minor to mean "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. IV 1998). Fourth, the CDA applied not only to commercial entities or transactions, but to all nonprofit entities and to individuals posting messages on their own computers. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to those Web communications that are made "for commercial purposes." 47 U.S.C. 231(a)(1) (Supp. IV 1998). Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view indecent or patently offensive material, regardless of whether the parents believed that it was appropriate for their children to obtain that material because of its value. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such prohibition. H.R. Rep. No. 775, *supra*, at 15.

Respondents argue (Br. in Opp. 12-13) that none of those differences has "constitutional significance." That argument ignores this Court's decision in *Reno* v. *ACLU*. In explaining why the CDA could not be justified under *Ginsberg* and failed strict scrutiny, the

Court discussed each of the factors noted above. 521 U.S. at 865-866, 870-874, 877-879. Congress in turn took account of the Court's decision in *Reno* v. *ACLU* by tailoring COPA in a manner that responds to those very concerns that the Court identified. There accordingly is no merit to respondents' assertion (Br. in Opp. 9-12) that *Reno* v. *ACLU* requires invalidation of COPA.

The changes made by Congress, moreover, are obviously significant. Unlike some other means of communication on the Internet, it is both technologically and economically feasible to screen for age on the World Wide Web. Pet. App. 75a-77a. COPA's three-prong harmful-to-minors standard tracks the standard upheld in *Ginsberg*; it does not suffer from the vagueness of the CDA's standard; and it vastly narrows the scope of coverage, eliminating coverage of such things as the seven "dirty words" monologue at issue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about safe sex practices, and library card catalogues. See *Reno* v. *ACLU*, 521 U.S. at 878. COPA's reduction in the age limit to under 17 allows more mature minors to have access to the material at issue. Persons who post material "for commercial purposes" can reasonably be expected to bear the cost of compliance as a part of the cost of doing business. And eliminating the prohibition against parents permitting their children to view the material at issue avoids interference with the parent-child relationship. Respondents' assertion (Br. in Opp. 12-13) that the changes have "no constitutional significance" is simply incorrect.

b. Respondents also argue (Br. in Opp. 14-17) that COPA imposes an unacceptable burden on constitutionally protected speech because adults will be deterred from seeking access to material that is placed behind

adult verification screens. The district court found, however, that adult verification services provide personal identification numbers to adults for $16.95 per year and furnish Web site operators with the software necessary to screen for such numbers at no cost. Pet. App. 75a-77a. The district court also found that approximately three million users possess a valid ID from one such service and that more than 46,000 sites use that service. *Id.* at 76a. While "some" adults may nonetheless be deterred from seeking access to material placed behind adult verification screens, *id.* at 81a, that is a small cost to pay for protecting children from the harmful effects of graphic pornographic images on the World Wide Web.

Under respondents' contrary view, state laws that require commercial vendors to place "harmful to minors" material behind a "blinder rack," in a "sealed wrapper," or inside an "opaque cover," and that require proof of adult status for purchase of such materials, would all be unconstitutional. All such laws deter "some" adults from purchasing the material. Despite that effect, the lower courts have regularly upheld those laws. See, *e.g.*, *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983). There is no reason for a different outcome here.

c. Finally, respondents contend (Br. in Opp. 17-19) that COPA is not narrowly tailored because the use of filtering software by parents is less restrictive and at least as effective. COPA, however, *compels* Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' "alternative," no entity is required to install filtering software. See Pet. App. 94a n.6; compare *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Blocking software also has several additional built-in limitations. As the district court found, it both blocks certain material that is not harmful to minors and fails to screen out certain material that is harmful to minors. Pet. App. 94a. It can be defeated by a computer-savvy minor. *Id.* at 82a. It can be expensive to purchase. H. R. Rep. No. 775, *supra*, at 19. And it must be updated periodically at an additional cost. *Id.* at 20.

More fundamentally, the requirements of COPA and the use of blocking software by parents are not mutually exclusive alternatives. Both can work together to prevent children from being exposed to harmful-to-minors material, and Congress envisioned that they would. 47 U.S.C. 230(d) (Supp. IV 1998) (requiring Internet service providers to notify customers of the availability of blocking software); H.R. Rep. No. 775, *supra*, at 19 (noting that blocking software may be effective for many parents). In those circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which envisions COPA and blocking software operating together—is significantly more effective in preventing access to harmful-to-minors material than the use of blocking software alone. Since the two together are significantly more effective in protecting children from harmful material than blocking software alone, respondents'

proposed alternative is not as effective as the scheme that Congress enacted.*

* * * * *

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

MAY 2001

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* Respondents assert (Br. in Opp. 19-20 n.3) that the government did not "challenge on appeal[] the district court's factual finding that blocking software was more effective at achieving the government's interest." The district court, however, found only that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material," Pet. App. 94a, not that it "was more effective." Moreover, relying on the limitations on blocking software discussed above, the government argued on appeal that blocking software is not a less restrictive and equally effective alternative. C.A. Br. 44-47. In any event, the relevant inquiry is not whether the district court's determination on the issue of effectiveness is supported by the record, but whether "substantial evidence" supports Congress's determination on that issue. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

Supreme Court, U.S.
FILED
APR 16 2001
OFFICE OF THE CLERK

No. 00-1293

In The
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE

NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES,

IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Law Center for Children and Families[1] ("NLC") is a law enforcement support organization which provides advice, training, legal research, briefs, and trial and appellate assistance to federal, state, and local prosecutors and police agencies throughout the United States and in several foreign countries, as well as to Congress and other legislative and administrative bodies. NLC specializes in legal and law enforcement issues related to obscenity, child pornography, unlawful sexual exploitation and abuse, the broadcasting of indecent material, and the display and dissemination of materials that are harmful to minors. NLC and its Chief Counsel have participated in numerous *amicus curiae* briefs before this Court and other federal and state appellate and trial courts on these issues. Counsel of Record provided testimony and advice to Congress on the Child Online Protection Act (COPA) and filed briefs for Members of Congress as *amici curiae* in the District Court and in the Third Circuit below. NLC submits that the decisions below are contrary to this Court's precedent and submits an argument not likely to be submitted by the parties.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amicus Curiae* in support of the Petition. Their letters of consent are on file with the Clerk of the Court.

---

[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Bruce A. Taylor of the National Law Center for Children and Families, an educational organization under IRS § 501(c)(3), and no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae*, its members, or counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The Court of Appeals was clearly in error in its refusal to narrowly construe the Child Online Protection Act's definition of "harmful to minors," 47 U.S.C. § 231 (e)(6), within a constitutionally valid scope and lend the necessary authoritative construction intended by Congress as a limitation on the test for what is "obscene for minors" to a constitutionally valid, non-geographic "adult" *age* community standard, rather than an unconstitutionally territorial *geographic* community standard. *ACLU v. Reno*, 217 F.3d 162, 173-78 (3d Cir. 2000), *reh. denied* (2000). Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from First Amendment protected speech is dependent on the medium. The Congressional intent expressed in its REPORT OF THE HOUSE COMMITTEE ON COMMERCE, H.R. Rep. No. 105-775, at 28 (1998), was that COPA was to be adapted to the World Wide Web by using a "new" standard of what the American adult-age community as a whole would find prurient and offensive for minors in the probable recipient age group. The Third Circuit refused to adopt this Congressionally intended customization of the "harmful to minors" test and, by such refusal, interpreted the Act in an unconstitutional fashion. 217 F.3d at 178. By doing so, that Court, as had the District Court below, failed in its duty to properly construe this federal statute so as to save it for valid application within constitutional boundaries.

For this reason alone, this Court should grant the Petition, reverse the decision of the Court of Appeals, and remand the cause to the Third Circuit for a narrowing authoritative construction to guide the District Court in the trial on the merits of this case.

ARGUMENT

The Court of Appeals focused solely on the "'contemporary community standards' aspect of COPA" in "affirming the District Court's ruling on a ground other than that emphasized by the District Court". 217 F.3d at 174, n. 19. As stated by the Court of Appeals, at 173-74:

> We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.

Although later discussing the arguments raised by the Government and the Congressional *amici* on this issue, the Court of Appeals rejected the Congressional intent to apply the Committee Report's statutory directive to create a "new harmful to minors definition" that was "crafted in a way to respond to the Supreme Court's concerns" in *Reno v. ACLU*, 521 U.S. 844 (1997). *See* H.R. Rep. No. 105-775, p. 13.

Congress specifically explained its intent to apply a medium-specific, non-geographic standard to the first two prongs of the test for what is "obscene for minors" or "harmful to minors" and the courts below failed in their duty to follow the requirements for federal court review of federal statutes expressed in *New York v. Ferber*, 458 U.S. 747, 769,

n. 24 (1982) ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (context is all important, including the medium involved).

This issue was discussed at pp. 16-17 of the BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* that was filed with the Third Circuit:

> This Court, like the Supreme Court in *Ferber*, should correct the assumption that federal courts can "widen the possibly invalid reach of the statute by giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the COMMITTEE REPORT.
>
> Courts recognize the need to follow these principles in applying the HTM test to pornographic treatments, rather than to ideas or messages in controversial works, as in the school cases: *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test. As stated in the COMMITTEE REPORT at 28: [emphasis added herein, not in original Brief]

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

The Court of Appeals below, at 178, failed to follow established First Amendment obscenity jurisprudence in its conclusions that (1) geographic standards would be inherently unconstitutional in cyberspace, that (2) obscenity and harmful to minors laws must be inherently applied by geographic standards, and that (3) COPA thus cannot be narrowed to avoid this perceived unconstitutionality even by following the intent of Congress to customize a new Web-specific test for "harmful to minors" that is American adult-age based, rather than geographic based.

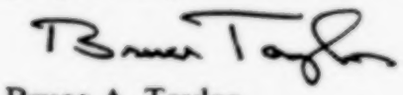
This Court should also correct this fundamental error for the additional reason that such an interpretation of community standards as exclusively territorial would or could be applied erroneously by federal and state courts to the application of adult obscenity laws to Internet or Web cases, despite this Court's recognition in *Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), that geographic standards are not required for testing obscenity and in *Reno v. ACLU*, at 878, n. 44, that "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

CONCLUSION

We submit the Congressional Committee Report was right and the Third Circuit was wrong on this critical issue and this Court should grant the Petition and correct this error.

Dated: April 16, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

Three copies of this Brief Amicus Curiae were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 16th day of April, 2001, addressed to:

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Supreme Court, U.S.
FILED
JUL 27 2001
CLERK

No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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58 pp

QUESTION PRESENTED

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. V 1999). COPA relies in part on "community standards" to identify material that is "harmful to minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because the statute relies on community standards to identify material that is harmful to minors.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ a Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corp., Backstripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

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Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearings on H.R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomms., Trade and Consumer Protection of the House Comm. on Commerce, 105th Cong., 2d Sess. (1998) 5
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In the Supreme Court of the United States

No. 00-1293

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 217 F.3d 162. The opinion of the district court granting respondents' motion for a preliminary injunction (Pet. App. 40a-100a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting respondents' application for a temporary restraining order (Pet. App. 101a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2000. A petition for rehearing was denied on September 15, 2000 (Pet. App. 124a-125a). On December 5, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 15, 2001. On January 9, 2001, Justice

Souter further extended the time within which to file a petition for a writ of certiorari to and including February 12, 2001. The petition for a writ of certiorari was filed on February 12, 2001, and was granted on May 21, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in the appendix to the petition for a writ of certiorari. Pet. App. 115a-123a.

STATEMENT

1. Pornographic material, from "the modestly titillating to the hardest-core," is "widely available" on the Internet. *Reno* v. *ACLU*, 521 U.S. 844, 853-854 (1997). In 1998, there were approximately 28,000 pornographic sites on the World Wide Web (Web), and those sites generated approximately $925 million in annual revenues. H.R. Rep. No. 775, 105th Cong., 2d Sess. 7 (1998). Pornographic Web sites often offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 10; Pet. App. 41a.

Because Web software is easy to use, "minors who can read and type are capable of conducting Web searches as easily as operating a television remote." H.R. Rep. No. 775, *supra*, at 9-10. As a result, pornographic material on the Internet is "widely accessible" to minors. *Id.* at 9. While many children deliberately search for pornographic Web sites, others accidentally

stumble upon them. *Id.* at 10. Searches using common terms such as toys, girls, boys, beanie babies, bambi, and doggy all lead directly to pornographic sites. *Ibid.*

Pornography is harmful to children because it does not provide them with a normal sexual perspective. H.R. Rep. No. 775, *supra*, at 11. It teaches without supervision or guidance, "inundating children's minds with graphic messages about their bodies, their own sexuality, and those of adults and children around them." *Id.* at 11. Moreover, "[t]he prevalence of violent, abusive, and degrading pornography can induce beliefs that such practices are not only common, but acceptable." S. Rep. No. 225, 105th Cong., 2d Sess. 2-3 (1998).

2. Congress first addressed the harmful effects of pornographic material on the Internet in the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, § 502, 110 Stat. 133. The CDA prohibited the transmission to minors over the Internet of "indecent" messages, 47 U.S.C. 223(a) (Supp. V 1999), as well as the display, in a manner available to minors, of material that is "patently offensive" as measured by "contemporary community standards," 47 U.S.C. 223(d)(1) (Supp. V 1999). The CDA provided a defense to prosecution to persons who conditioned access to covered material on proof of adult status, or who limited minors' access through other reasonable and effective means. 47 U.S.C. 223(e)(5) (A) and (B) (Supp. V 1999).

In *Reno* v. *ACLU*, this Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that government has "'a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards."

521 U.S. at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

In defending the constitutionality of the CDA, the government relied on *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld the constitutionality of a state statute that prohibited the sale to minors of magazines that were obscene as to minors, but not as to adults. The Court distinguished the CDA from the "harmful-to-minors" statute upheld in *Ginsberg* on four grounds. *Reno* v. *ACLU*, 521 U.S. at 865-866, 877-878. First, the statute upheld in *Ginsberg* did not prohibit parents from purchasing material for their children, while the CDA made no such exception. *Id.* at 865, 878. Second, the statute upheld in *Ginsberg* applied only to commercial transactions, while the CDA contained no such limitation. *Id.* at 865, 877. Third, the statute upheld in *Ginsberg* expressly did not apply to material that had redeeming value for minors, whereas the CDA did not define "indecent" and "patently offensive," and omitted any requirement that the material lack serious value for minors. *Ibid.* Fourth, the statute upheld in *Ginsberg* defined a minor as a person under the age of 17, whereas the CDA applied to persons under 18 years. *Id.* at 865-866, 878. In connection with the third distinction—that the CDA failed to define its key terms and covered material having serious value for minors—the Court also observed that the "'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-878.

Because of the breadth of the CDA's coverage, the Court also rejected the government's argument that

the CDA's affirmative defenses created sufficient opportunities for adult-to-adult communication. The Court relied on the district court's findings that there was no effective way to determine the age of a user who seeks access to material through e-mail, mail exploders, newsgroups, or chat rooms, and that it would be prohibitively expensive for noncommercial Web sites to verify that their users were adults. *Reno* v. *ACLU*, 521 U.S. at 876-877.

3. Congress reexamined the problem of minors' access to pornographic material on the Internet in light of *Reno* v. *ACLU*. Both the House of Representatives and the Senate conducted hearings on the subject. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearings on H. R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomms., Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); *Internet Indecency: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 105th Cong., 2d Sess. (1998). Following those hearings, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (codified at 47 U.S.C. 231 (Supp. V 1999)).

a. Congress enacted legislative findings that explain the basis for COPA. Congress found that there continue to be "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision and control." 47 U.S.C. 231 note (Supp. V 1999) (Finding 1). Congress further determined that "protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling gov-

ernmental interest." 47 U.S.C. 231 note (Supp. V 1999) (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Supp. V 1999) (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress therefore concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Supp. V 1999) (Finding 4).

b. COPA subjects to criminal and civil sanctions any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1) (Supp. V 1999). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(d)(2)(A)—*i.e.*, if he "devotes time, attention, or labor" to making harmful-to-minor communications "as a regular course of [his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B) (Supp. V 1999).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file,

article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. V 1999). A "minor" is defined as any person under the age of 17. 47 U.S.C. 231(e)(7) (Supp. V 1999).

COPA's definition of nonobscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard approved in *Ginsberg*. H.R. Rep. No. 775, *supra*, at 13, 27-28. It also tracks the standard that is used in many state laws that prohibit the public display of material that is harmful to minors and that effectively require such material to be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. H.R. Rep. No. 775, *supra*, at 13. COPA expressly provides that the question whether material is designed to appeal to the "prurient interest" shall be determined according to "community standards," 47 U.S.C. 231(e)(6)(A) (Supp. V 1999). With respect to the other two prongs, Congress intended for its definition "to parallel the *Ginsberg* and *Miller* definitions of obscenity

and harmful to minors, as those definitions were later refined in *Smith* v. *United States*, 431 U.S. 291, at 300-02, 309 (1977) and *Pope* v. *Illinois*, 481 U.S. 497, at 500-01 (1987)." H.R. Rep. No. 775, *supra*, at 27-28. Under that line of cases, "prurient interest" and "patent offensiveness" are determined according to "community standards," but "serious value" is determined under a "reasonable person" test, and not according to "community standards." *Pope* v. *Illinois*, 481 U.S. 497, 500-501 & n.3 (1987). Congress regarded "community standards" as "reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28.

COPA provides "an affirmative defense to prosecution" if a person engaged in the business of making harmful-to-minors communications, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1) (Supp. V 1999). To qualify for the defense, the person may (A) "requir[e] use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accept[] a digital certificate that verifies age," or (C) use "any other reasonable measures that are feasible under existing technology." 47 U.S.C. 231(c)(1) (Supp. V 1999).

c. In crafting COPA, Congress sought to "address[] the specific concerns raised" by this Court when it invalidated the CDA in *Reno* v. *ACLU*, and to track more closely the statute upheld in *Ginsberg*. H.R. Rep. No. 775, *supra*, at 12-16; S. Rep. No. 225, *supra*, at 2, 5-6. Six changes are significant.

First, the CDA applied to communications other than those made by means of the Web, including communications made by e-mail, newsgroups, and chat rooms, *Reno* v. *ACLU*, 521 U.S. at 851, and age screening was found not to be technologically feasible for those forms

of communication, *id.* at 876-877. In contrast, COPA applies only to material that is communicated by means of the Web, 47 U.S.C. 231(a)(1) (Supp. V 1999), where age screening is both technologically feasible and economically affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA applied to materials that were "indecent" or "patently offensive," without defining either term and without making clear whether the "indecent" and "patently offensive" determinations should be made with respect to adults or minors. *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. In contrast, COPA identifies the particular sexual activities and anatomical features depiction of which may be found to be "patently offensive," and makes clear that the determination whether material containing such a depiction is "patently offensive" shall be made "with respect to minors." 47 U.S.C. 231(a)(1) and (e)(6)(B) (Supp. V 1999).

Third, the CDA did not require that the covered material "appeal to the prurient interest" or lack "serious value." It therefore covered vast amounts of non-pornographic materials having serious value, including material containing any of the seven "dirty words" used in the monologue at issue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about prison rape or safe sexual practices, artistic images of nude subjects, and arguably the card catalog of the Carnegie Library. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA contains all three prongs of the *Ginsberg* test. Thus, by its terms, COPA applies only to material that, "taken as a whole and with respect to minors," is designed to appeal to the "prurient interest," and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C) (Supp. V 1999).

Fourth, the CDA applied not only to commercial transactions, to which the statute in *Ginsberg* was limited, but also to all nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not have been able to afford the costs of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 877. In contrast, COPA applies only to persons engaged in business who make harmful-to-minors Web communications "for commercial purposes," 47 U.S.C. 231(a)(1) (Supp. V 1999), "as a regular course" of their businesses, 47 U.S.C., 231(e)(2)(B) (Supp. V 1999). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 13-5.

Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view covered material. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such intrusion on the parent-child relationship. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.

Sixth, the CDA defined a minor as any person under 18 years of age, thereby including some persons in their first year of college. *Reno* v. *ACLU*, 521 U.S. at 865-866, 878. In contrast, COPA defines "minor" as "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. V 1999).

4. Immediately after COPA was signed into law, the American Civil Liberties Union and others (respondents) filed suit in federal district court to challenge it. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. Pet. App. 12a & n.13, 42a. The district court entered a temporary restraining order prohibiting the government from enforcing the

Act, *id.* at 112a, and that order was extended for a brief period by agreement of the parties, *id.* at 42a-43a.

The day the TRO was set to expire, the district court entered a preliminary injunction prohibiting the government from enforcing COPA. Pet. App. 42a-43a, 98a. Although the court determined that respondents were likely to prevail on their First Amendment claim, many of the court's findings and conclusions support COPA's constitutionality. For example, the district court found that pornographic material is widely available to minors who "surf" the Web. *Id.* at 41a. The court also held that the government has a compelling interest in protecting minors from harmful material on the Web that is not obscene by adult standards. *Id.* at 90a.

The court further found that adult identification systems permit Web site operators to prevent minors from obtaining access to harmful materials, while still offering such materials to adults. Pet. App. 71a. The court noted that Adult Check provides, at no cost to a Web site operator, a screen that can be used to block access by minors. *Id.* at 75a. An adult who comes across such a screen may click on a link to the Adult Check site, immediately purchase a Personal Identification Number (PIN) for an annual fee of $16.95, return to the original site, and use the PIN to obtain access to the site. *Id.* at 75a-76a. The court cited testimony that approximately three million people possess a valid Adult Check PIN, and 46,000 Web sites accept them. *Id.* at 76a. Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. *Id.* at 90a. In support of that conclusion, the court found only that respondents were likely to establish at trial that the placement of adult screens in front of harmful-to-minor materials "may

deter" users from seeking access to such materials, which "may affect" the speakers' economic ability to provide such communications. *Id.* at 89a.

The district court also found that the voluntary use of "blocking" technology might be "at least as successful as COPA" in restricting minors' access to harmful material without imposing the same burdens on constitutionally protected speech. Pet. App. 94a. The court acknowledged that blocking software is both over- and under-inclusive—it blocks some sites that contain no harmful material, and permits access to some sites that contain such material. *Ibid.* The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 82a. The court found it more significant, however, that blocking software can block harmful material not covered by COPA, such as material on foreign Web sites and material outside the Web. *Id.* at 94a.

5. The court of appeals affirmed the district court's preliminary injunction. Pet. App. 1a-39a. It did so, however, on a ground upon which the district court had not relied, the parties had not briefed on appeal, and the court of appeals had raised for the first time at oral argument. *Id.* at 21a, 22a n.19.

Like the district court, the court of appeals held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." Pet. App. 20a. Unlike the district court, the court of appeals did not question the government's ability to demonstrate that COPA is the least restrictive means available to further that compelling interest. Thus, the court of appeals rejected

the district court's reliance on the voluntary use of blocking software as a less restrictive alternative (*id.* at 15a n.16); it acknowledged that, in enacting COPA, Congress had sought to address the "specific concerns" raised in *Reno* v. *ACLU* (*id.* at 6a); and it assumed for purposes of its decision that "there may be no other means by which harmful material on the Web may be constitutionally restricted" (*id.* at 3a). The court held, however, that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations," *id.* at 33a (citation omitted), and it concluded that "regulation under existing technology is unreasonable here," *id.* at 34a.

The court of appeals based that finding of unreasonableness on COPA's "reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." Pet. App. 21a. The court held that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a.

The court of appeals noted that in *Reno* v. *ACLU*, this Court had pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." Pet. App. 22a (quoting 521 U.S. at 877-878). The court then determined that "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users," making all content posted on the Web available to a nationwide audience. *Id.* at 24a. As a result, the court reasoned, "to avoid

liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system." *Id.* at 24a-25a. If Web publishers were to choose to comply through age screening, the court noted, it "would prevent access to protected material by any adult * * * without the necessary age verification credentials." *Id.* at 25a. Based on those considerations, the court concluded that COPA "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

The court of appeals acknowledged that in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), this Court upheld the application of varying community standards to persons whose commercial conduct had effects in different geographic areas. Pet. App. 25a-26a. It distinguished those cases, however, on the ground that the parties involved "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." *Id.* at 26a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the government has a compelling interest in protecting children from material that is harmful to them, even if it is not obscene for adults. The court of appeals in this case agreed with that fundamental proposition. Furthermore, the court of appeals assumed for purposes of its decision that the Child Online Protection Act represents the least restrictive alternative to further that

compelling interest, and that there may be no other means by which harmful material on the Web may be constitutionally restricted. The court nonetheless held that COPA's reliance on community standards to determine whether material is harmful to minors imposes an impermissible burden on protected speech. This Court, however, has long approved the use of community standards as a central component of obscenity and harmful-to-minors statutes, and has viewed them as furnishing an indispensable First Amendment safeguard.

A. COPA's harmful-to-minors standard is firmly grounded in widely accepted and constitutionally sound state harmful-to-minors laws. In *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968), this Court upheld the constitutionality of a state law that prohibited the sale to minors of "harmful" material, explaining that it constitutionally advances the state's interest in shielding minors from material that impairs their moral development.

Since *Ginsberg*, many States have also prohibited the public display of material that is harmful to minors. Such laws effectively require pornographic magazines such as Hustler, Penthouse, and Playboy to be placed behind blinder racks, in a sealed wrapper, or otherwise shielded from minors. Courts of appeals and state courts have regularly upheld such state display laws, rejecting claims that they impermissibly interfere with adult access to protected speech.

Pornographic material is so widely available on the World Wide Web that it threatens to render state blinder laws largely meaningless. To address that serious problem, COPA requires commercial entities that regularly display harmful-to-minors material to place behind age verification screens the same kind of material covered by state blinder laws.

B. The court of appeals singled out COPA's reliance on community standards as constitutionally flawed. But community standards have long been a component of both state harmful-to-minors laws and state and federal obscenity laws. Far from treating a reliance on community standards as constitutionally suspect, this Court has viewed community standards as furnishing an indispensable First Amendment safeguard. As explained in *Miller* v. *California*, 413 U.S. 15, 33 (1973), reliance on community standards ensures that material is assessed in terms of its effect on an average person, rather than on an unusually susceptible one.

C. The court of appeals rested its condemnation of community standards on a finding that Web businesses cannot prevent material from reaching particular geographic areas, effectively forcing those businesses to conform to the standards of the most puritan community. There are ways for Web businesses to limit their material to particular geographic areas. Even if we assume, however, that Web businesses must conform to community standards throughout the country, that would not render COPA unconstitutional.

The inevitable consequence of *Miller*'s approval of community standards is that a commercial entity that chooses to operate a business on a nationwide medium must observe community standards throughout the nation. There is nothing unreasonable about that consequence. A commercial entity that regularly displays harmful-to-minors material on a nationwide medium obtains the advantages of a nationwide market for its profit-making activities. It is entirely reasonable to require businesses that have made that choice, and have reaped the associated economic advantages, to make sure that their business activities do not cause

harm to minors in the communities from which they seek to profit.

In *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), this Court held that commercial entities that distribute possibly obscene material to multiple communities have the responsibility to ensure that their commercial activities are lawful in each of the affected communities. The principle involved in those cases is equally applicable here.

D. The court of appeals rested its holding in large part on its view that COPA's reliance on community standards requires vast amounts of material to be placed behind age verification screens. In reaching that conclusion, however, the court ignored the serious value prong of the harmful-to-minors statute. That prong of the statute does not incorporate community standards, and it excludes from coverage as a matter of law material that has serious value for a legitimate minority of older minors. The serious value prong of the statute, together with the legal limitations imposed by the other two prongs, confines COPA's reach to material that is clearly pornographic, and excludes from coverage material that contains explicit but serious discussions of sexual issues.

E. The constitutionality of COPA's reliance on community standards is further supported by Congress's judgment that community standards are reasonably constant throughout the country. The exhibits introduced in this case confirm that common-sense judgment. They illustrate that, as to material that is not excluded from coverage as a matter of law, there is unlikely to be much variance throughout the nation on the question whether the material appeals to the prurient interest and is patently offensive with respect

to minors. Congress's intent that juries would be instructed to apply community standards without geographic specification further promotes a reasonably constant application of community standards.

F. COPA's reliance on community standards does not impose an undue burden on speech. The Act is directed primarily to commercial pornographers who already put most of their material behind age verification screens. The principal effect of the Act is to require those commercial pornographers to put their teasers behind age verification screens as well. COPA's reliance on community standards also does not impose an undue burden on other businesses that regularly display material that may be harmful to minors. As to material that lacks serious value for a legitimate minority of older minors, such businesses could reasonably anticipate that juries in different communities would react similarly to the material.

To the extent that there remains any meaningful variance in community standards, however, businesses that regularly display possibly harmful material would simply need to place somewhat more material behind an age verification screen. At least one adult verification service (Adult Check) will set up an adult verification system at no cost to the Web site. Moreover, as of the time of the district court's decision, an adult identification number could be purchased for less than $20 per year, and millions of adults had purchased adult IDs. At most, COPA's reliance on community standards imposes a modest burden on adult access to pornographic material, and that modest burden is outweighed by the government's compelling interest in shielding minors from material that is harmful to them.

G. In *Reno* v. *ACLU*, the Court noted that one feature of the CDA was that the community standards

criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended. 521 U.S. at 877-878. The Court made that observation, however, in connection with a statute that it found to be of unprecedented vagueness and breadth, and that was not limited to material that was harmful to minors, for which Congress determined in enacting COPA that community standards are reasonably constant throughout the United States. In COPA, Congress responded directly to the Court's concern about the unprecedented breadth and undefined parameters of the CDA. In contrast to the CDA, COPA's coverage is both narrow and well-defined. In the context of that very different statute, a reliance on community standards does not raise independent constitutional concerns.

ARGUMENT

THE CHILD ONLINE PROTECTION ACT'S RELIANCE ON COMMUNITY STANDARDS DOES NOT VIOLATE THE FIRST AMENDMENT

COPA makes it unlawful for a person engaged in business to make communications for commercial purposes by means of the World Wide Web that are available to minors and that regularly include material that is "harmful to minors." 47 U.S.C. 231(a)(1) and (e)(2) (Supp. V 1999). The Act affords a defense to prosecution if access to "harmful-to-minors" material is conditioned on verification of adult status or if other good faith efforts are made to prevent minors from obtaining access to such material. 47 U.S.C. 231(c)(1) (Supp. V 1999). COPA uses a three-part test to determine whether material is harmful to minors: the material must (A) taken as a whole, be designed to

appeal to the "prurient interest" of minors, (B) depict sexual acts or contact or specified parts of the anatomy in a manner that is "patently offensive" with respect to minors; and (C) taken as a whole, "lack[] serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The first two inquiries—prurient interest and patent offensiveness—are to be decided from the perspective of "the average person" applying "contemporary community standards." 47 U.S.C. 231(e)(6)(A) (Supp. V 1999); see pp. 7-8, *supra*. Congress understood "community standards" to be "reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28. The "serious value" prong has a "reasonable person" test that does not incorporate community standards. See pp. 7-8, *supra*.

COPA regulates speech based on its content. Accordingly, in order to survive constitutional scrutiny, it must be supported by a compelling interest, and it must be the least restrictive alternative available to further that interest. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). The court of appeals did not suggest that COPA failed either of those requirements. To the contrary, the court held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards," Pet. App. 20a, and it assumed for purposes of its decision that "there may be no other means by which harmful material on the Web may be constitutionally restricted," *id.* at 3a. The court of appeals nonetheless held that COPA's reliance on "community standards" to help identify material that is harmful to minors "imposes an overreaching burden and restriction on constitutionally

protected speech." *Id.* at 29a; see also *id.* at 2a-3a, 21a, 34a. That holding is incorrect. COPA's reliance on community standards does not violate the First Amendment.

A. COPA's Harmful-to-Minors Standard Is Modeled On State Harmful-to-Minors Laws That Have Been Held Constitutional

1. COPA's harmful-to-minors standard has its origins in statutes that prohibit the sale to minors of material that is "harmful" to them. This Court addressed the constitutionality of such a statute in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The harmful-to-minors statute at issue in *Ginsberg* covered "any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it":

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

Id. at 646. The Court described the New York statute as covering "'girlie' picture magazines" that are not obscene by adult standards, but are obscene with respect to minors. *Id.* at 634.

With that understanding of the limited reach of the statute, the Court upheld its constitutionality, stating that "[w]e do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors'

constitutionally protected freedoms." *Ginsberg*, 390 U.S. at 638. The Court explained that "[t]he legislature could properly conclude" that parents who have "primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, "[t]he State also has an independent interest in the well-being of its youth," *id.* at 640, and the legislature was entitled to regard the material covered by the statute as "impairing the ethical and moral development" of minors, *id.* at 641.

2. At the time of *Ginsberg*, nearly every State had a prohibition on the sale to minors of "harmful-to-minors" material. 390 U.S. at 647-648. Those state laws, or slight modifications of them, remain in effect today. See Addendum I, *infra*, 1a-2a. Many States have found, however, that a sale prohibition is insufficient to vindicate their interest in shielding minors from the harmful effects of pornographic materials, such as the pornographic photographs that appear in Hustler, Penthouse, and Playboy. When such magazines are placed in a public area of a store, minors may be able to gain access to them without having to purchase them. Many States have therefore established a prohibition on the public display of material that is harmful to minors. Such laws effectively require "harmful-to-minors" material to be placed behind a blinder rack, in a sealed wrapper, in an opaque cover, in a separate room, or behind the counter. See Addendum II, *infra*, 3a.

This Court was presented with a facial challenge to one such law in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). The statute at issue in *American Booksellers* made it unlawful to display material that was "harmful to juveniles" in a manner that permitted juveniles to examine and peruse the material, and defined "harmful to juveniles" in much

the same way that the statute in *Ginsberg* defined "harmful to minors." *Id.* at 386-387. The district court held the statute unconstitutional, on the ground that it impermissibly interfered with adult access to nonobscene works, and the court of appeals affirmed. *Id.* at 391.

In this Court, the plaintiffs argued that the display prohibition applied to as much as 25% of a typical bookseller's stock, and cited 16 examples of valuable works that allegedly were covered. 484 U.S. at 394-395. The State, by contrast, argued that the law covered only "a very few 'borderline' obscene works," and none of the plaintiffs' examples. *Id.* at 394. This Court noted that, if the State's description of the statute's coverage was accurate, it would affect "substantially" the cost of complying with the law, and the burden on adult access to speech would be "dramatically altered." *Ibid.* Accordingly, rather than addressing the merits, the Court certified to the Virginia Supreme Court the question whether any of the 16 books introduced as plaintiffs' exhibits were covered by the statute. *Id.* at 398.

In *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618 (1988), the Virginia Supreme Court answered the certified question by holding that none of 16 books fell within the ambit of the state statute. The court construed the statute as not applying to works that "have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents." *Id.* at 624. The court then concluded that although the 16 books "vary widely in merit, none of them lacks 'serious literary, artistic, political or scientific value'" for that group of minors. *Ibid.* The books at issue included A. Comfort & J. Comfort, *The Facts of Love* (1979), and *The New Our Bodies Ourselves* (J. Pincus and W. Sanford eds. 1984). 372 S.E. 2d at 622.

The Facts of Love contains graphic drawings of the human anatomy, and both books contain explicit, but informative, discussions of sexual acts. *Facts of Love*, at 25-55; *The New Our Bodies Ourselves*, at 164-197.[1]

After the Virginia Supreme Court's decision, this Court remanded the case to the Fourth Circuit for reconsideration in light of that decision. On remand, the Fourth Circuit upheld the constitutionality of the state statute, stating that it "agree[d] with the Virginia Supreme Court that the amendment to the statute places a minimal burden on booksellers and represents a constitutionally permissible exercise of the state's police powers." *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (1989). This Court then denied certiorari. 494 U.S. 1056 (1990).

Other courts of appeals and state courts have similarly upheld the constitutionality of state statutes that prohibit the public display of "harmful-to-minors" material. Despite claims that such laws impose unacceptable burdens on adult access to speech, those courts have held that the laws constitutionally further the government's interest in protecting minors from material that is harmful to them. *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117

[1] The other 14 books at issue in *Virginia* v. *American Bookseller* were: R. Bell, *Changing Bodies, Changing Lives* (1980); J. Betancourt, *Am I Normal?* (1983); J. Blume, *Forever* (1975); P. Blumstein & P. Schwartz, *American Couples* (1983); J. Collins, *Hollywood Wives* (1983); S. Donaldson, *Lord Foul's Bane* (1977); *The Family of Woman* (J. Mason ed. 1979); P. Haines, *The Diamond Waterfall* (1984); J. Joyce, *Ulysses* (1961); J. Lindsey, *Tender is the Storm* (1985); L. Niven & J. Pournelle, *Lucifer's Hammer* (1977); *The Penguin Book of Love Poetry* (J. Stallworthy ed. 1973); M. Sheffield, *Where Do Babies Come From?* (1972); and J. Updike, *The Witches of Eastwick* (1984). See 372 S.E.2d at 622.

(1997); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 526-529 (Tenn. 1993); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d 919, 941-942 (Pa. Super. Ct. 1984); but see *Tattered Cover, Inc.* v. *Tooley*, 696 P. 2d 780 (Colo. 1985).

3. The Web threatens to render state harmful-to-minors laws largely meaningless. There are literally thousands of pornographic sites on the Web. Those sites often offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 7, 10. Minors today can search the Web as easily as they can change television channels. *Id.* at 9-10. Thus, in the privacy of their homes or those of friends, unsupervised minors can, with the click of a mouse, visit one pornographic site after another, and view and then print one set of pornographic teasers after another.

In adopting COPA, Congress sought to address that serious problem. Responding to this Court's holding in *Reno* v. *ACLU*, 521 U.S. at 865-866, 877-878, that the CDA suffered from vices not shared by state harmful-to-minor laws, and drawing on the successful experience that States have had with harmful-to-minors display laws, Congress adopted the same basic approach for the Web that States have adopted for local stores. Like those display laws, COPA does not ban the sale of harmful-to-minors material. Instead, it simply requires that the same kind of material that States require to be placed behind blinder racks must be placed behind adult identification screens or otherwise shielded from minors who are surfing the Web. See H.R. Rep. No.

775, *supra*, at 15 (By requiring "age verification before pornography is made available," COPA in effect requires commercial online pornographers "to put sexually explicit images 'behind the counter.'"); 144 Cong. Rec. H9910 (daily ed. Oct. 7, 1998) (remarks of Rep. Wilson) ("we are really doing no more than is required by most Circle K's or convenience stores").

Because COPA uses the same harmful-to-minors standard as state display laws, its scope is similarly narrow. Like those laws, COPA applies to pornographic material such as pictures that appear in Hustler, Penthouse, and Playboy. Like those laws, and unlike the CDA, COPA does not apply to material that has serious value for a legitimate minority of older minors, such as the use of graphic language to make a serious or humorous point, discussions about prison rape, discussions about safe sex, or the kind of artistic paintings of nude subjects that are displayed in the National Gallery of Art. Compare *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. Moreover, like the state display laws, COPA's harmful-to-minors standard does not impose an undue burden on protected speech. Instead, its principal effect is simply to require commercial pornographers who already place most of their pornographic material behind adult verification screens to place their pornographic teasers behind those screens as well. COPA's harmful-to-minors standard is therefore firmly grounded in widely accepted and constitutionally sound state harmful-to-minors laws.

B. Community Standards Are An Established Component Of Obscenity And Harmful-To-Minors Laws

The court of appeals isolated one aspect of COPA's harmful-to-minors standard as constitutionally flawed —its reliance on community standards to help deter-

mine whether material is designed to appeal to the prurient interest of minors and is patently offensive with respect to minors. That reliance, however, is not unique to COPA. Community standards have long been a component of obscenity and harmful-to-minors statutes, and this Court has repeatedly approved their use.

The application of community standards in determining obscenity predated this Court's seminal decision in *Roth* v. *United States*, 354 U.S. 476 (1957). See *id.* at 488-489 & n.26. In *Roth*, the Court upheld the constitutionality of applying "contemporary community standards" to determine whether material is obscene. *Ibid.* The statute upheld in *Ginsberg* similarly applied to material that was "patently offensive *to prevailing standards in the adult community as a whole* with respect to what is suitable material for minors." 390 U.S. at 646 (emphasis added). In *Miller* v. *California*, 413 U.S. 15, 30-34 (1973), the Court reaffirmed that, in enforcing obscenity laws, States are free to apply "community standards" rather than a hypothetical "national standard" in determining what is designed to appeal to the "prurient interest" or what is "patently offensive." And in subsequent cases, the Court has upheld the constitutionality of applying "community standards" in deciding those issues under federal obscenity laws. *Sable*, 492 U.S. at 124-126; *Hamling* v. *United States*, 418 U.S. 87, 106 (1974); *United States* v. *12 200-Foot Reels of Super 8 M.M. Film*, 413 U.S. 123, 129-130 (1973). State harmful-to-minors laws, including display laws, similarly incorporate "community standards" to determine whether material is designed to appeal to the prurient interest of minors, is patently offensive with respect to minors, or both. See Addendum III, *infra*, 4a-5a.

Far from treating community standards as constitutionally suspect, this Court has always viewed community standards as furnishing an indispensable First Amendment safeguard. Early lower court obscenity cases had permitted obscenity to be judged by its effect upon "particularly susceptible persons." *Roth*, 354 U.S. at 489. In *Roth*, the Court rejected that standard as inconsistent with the First Amendment, and approved application of community standards as a safeguard against the censoring of works that legitimately address sexual issues. 354 U.S. at 488-489. In *Miller*, the Court emphasized the crucial role of community standards, explaining that they ensure that material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person." 413 U.S. at 33. And in *Hamling*, 418 U.S. at 107, the Court reiterated that the application of community standards "assure[s] that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[2]

C. It Is Appropriate To Require A Nationwide Business To Conform To Community Standards Throughout The Country

1. The court of appeals acknowledged that community standards could be applied constitutionality in all contexts other than the Internet and the Web. Pet.

[2] Under this Court's decisions, the legislature is free to define community standards in terms of a particular statewide community, a particular local community within a State, or without any geographic specification. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Miller*, 413 U.S. at 33-34. In COPA, Congress has chosen to have juries instructed to apply community standards without geographic specification. See p. 38, *infra*.

App. 35a. The court held, however, that community standards could not be applied constitutionally to the Web. Based on the determination that there is no technology on the Web that permits a Web site operator to limit a communication to a particular geographic area, it concluded that applying community standards to the Web effectively means that a commercial Web site must place behind an age verification screen the material that offends the most puritan community. *Id.* at 24a-25a. The court viewed that burden as constitutionally impermissible. *Id.* at 29a.

The court of appeals' belief that there is no way for a Web site operator to avoid disseminating its material to a particular geographic community is incorrect. As discussed in the footnote below, a Web business can target particular geographic areas.[3] Even if we accept

[3] In support of its conclusion, the court of appeals cited a finding of the district court. Pet. App. 24a. The district court found that, once a Web site "chooses to make [material] available to all, it generally cannot prevent that content from entering any geographic community." *Id.* at 62a. The district court's limited finding does not support the court of appeals' broader conclusion that there is no way at all in which a web site operator can limit its material to particular geographic communities. For example, a Web business can require persons who wish to gain access to its site to register and obtain a password before they can proceed further. The online version of the *New York Times*, for example, requires such registration in order to gain access to all but the first page of its Web site. See http://www.nytimes.com. Following that model, a Web publisher could obtain name and address information through a registration process, and then mail passwords to the addresses provided at registration, limiting such mailings to the geographic areas of its choice. Compare *United States* v. *Thomas*, 74 F.3d 701, 705 (6th Cir. 1996) (upholding application of community standards to electronic bulletin board, noting that access to the board was "limited to members who were given a password after they paid a membership fee and submitted a signed application

for present purposes the premise of the court of appeals' holding—that COPA effectively requires Web businesses to conform to community standards throughout the country concerning what material must be placed behind an age verification screen—that consequence does not violate the First Amendment.

2. As already discussed, the Court in *Miller* upheld the constitutionality of applying community standards rather than uniform national standards in determining whether material appeals to the prurient interest and is patently offensive. 413 U.S. at 30-34. The inevitable consequence of that approval is that a person who chooses to conduct a nationwide business or to operate a business on a nationwide medium must observe community standards throughout the nation.

There is nothing "unreasonable" about that consequence. Pet. App. 33a. When a commercial entity chooses to conduct a nationwide business or to operate on a nationwide medium, like the Web, and to regularly display harmful-to-minors material, it obtains the advantages of a nationwide market for its profit-making activities. It is entirely reasonable to require busi-

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form" that "requested the applicant's age, address, and telephone number"). In addition, developing technologies now permit a Web business to determine instantly a content receiver's geographical identity based on the Internet protocol (IP) address of the user's computer. J. Goldsmith & A. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 810 (2001). See *Interim Order, Ligue Contre le Racisme et l'Antisemitisme* v. *Yahoo! Inc.*, No. Rg: 00/05308 (T.G.I. Paris, Nov. 20, 2000) (detailing ways in which Yahoo! Inc., could block access from France to sites auctioning Nazi memorabilia). See also M. Richtel, *High Stakes in the Race to Invent a Bettor-Blocker*, N.Y. Times, June 28, 2001, at E6 (describing efforts of online gambling companies to avoid liability by restricting access by persons from countries where such gambling is illegal).

nesses that have made that choice and that have reaped that economic advantage to make sure that their business activities do not cause harm to minors in the communities from which they seek to profit.

3. This Court's decisions in *Hamling* and *Sable* support that conclusion. *Hamling* involved a criminal prosecution under 18 U.S.C. 1461 for mailing obscene material. The Court upheld the constitutionality of applying community standards rather than uniform national standards to determine the issue of obscenity under that statute. 418 U.S. at 106-107. In dissent, Justice Brennan argued that application of community standards under the mail statute violated the First Amendment. He contended that "[n]ational distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander," and that rather than "risking the expense and difficulty of defending against prosecution in any of several remote communities," national distributors will "retreat to debilitating self-censorship." *Id.* at 144. The Court rejected Justice Brennan's argument that exposing a national distributor to potentially varying community standards imposed an impermissible burden on protected speech. *Id.* at 106. The Court stated that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Ibid.*

In *Sable*, 492 U.S. at 124-126, the Court upheld the constitutionality of the prohibition in 47 U.S.C. 223(b) against obscene telephone messages. The Court rejected Sable's argument that the statute violated the

First Amendment because it effectively "compell[ed]" those who operate dial-a-porn businesses "to tailor all their messages to the least tolerant community." 492 U.S. at 124-126. The Court read *Hamling* to foreclose the argument that the need to comply with potentially varying community standards renders a federal statute unconstitutional. *Id.* at 125. The Court further noted that "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve." *Ibid.* While the development of a system to screen calls might involve some costs, the Court concluded, "there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages." *Ibid.* Ultimately, the Court viewed the question of how to comply with a statute that may be triggered by varying community standards to be one "for the message provider to make." *Ibid.* The Court explained that "[t]here is no constitutional barrier * * * to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 125-126.

4. The court of appeals sought to distinguish *Hamling* and *Sable* on the ground that the parties involved in those cases "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." Pet. App. 26a. "By contrast," the court stated, "Web publishers have no such comparable control." *Ibid.* As we have pointed out, see note 3, *supra*, Web businesses

can control—albeit at some expense—the distribution of their materials into particular geographic areas.

More fundamentally, *Hamling*'s and *Sable*'s approval of the application of varying community standards did not depend on the ability of the parties in those cases to exercise geographic control over the material they distributed. *Hamling* did not mention geographic control as a factor in its analysis. While *Sable* noted the distributor's ability to exercise geographic control (albeit by incurring "some cost[]") as a further factor supporting the constitutionality of the prohibition against obscene telephone messages, it held that, regardless of that factor, "Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Sable*, 492 U.S. at 125-126.

Thus, the principle that emerges from *Hamling* and *Sable*, and the inevitable consequence of *Miller*'s approval of community standards, is that a business that chooses to engage in commercial conduct that has effects in more than one community has the responsibility to ensure that those effects are lawful in each of the affected communities. That principle applies as much to commercial pornographers on the Web as to the parties involved in *Hamling* and *Sable*.

D. The Harmful-To-Minors Test Significantly Circumscribes The Types of Material Covered By COPA

The court of appeals' view that community standards cannot be applied constitutionally to the Web was premised in large part on its assumption that COPA's reliance on community standards effectively requires "vast amounts" of worthwhile material to be placed behind adult verification screens. Pet. App. 25a. The harmful-to-minors test, however, narrowly cabins the material that is covered by the Act, so that COPA

applies primarily to pornographic teasers that appear on the Web sites of commercial pornographers. Thus, if COPA requires vast amounts of material on the Web to be placed behind screens, it is only because commercial pornographers display so many pornographic teasers.

The serious value prong, in particular, significantly circumscribes the types of material subject to COPA. In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the Court held that the serious value prong of the *Miller* obscenity standard does not incorporate community standards. The Court explained that "insofar as the First Amendment is concerned, * * * the value of the work [does not] vary from community to community based on the degree of local acceptance it has won." *Id.* at 500. Instead, the proper inquiry is "whether a reasonable person would find * * * value in the material, taken as a whole." *Id.* at 500-501. Moreover, "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Id.* at 501 n.3.

In the context of state harmful-to-minors display laws, that has meant that material is excluded from coverage if it has "serious literary, artistic, political, or scientific value for a legitimate minority of normal, older adolescents." *Commonwealth* v. *American Bookseller Ass'n*, 372 S.E.2d at 624; see also *Davis-Kidd Booksellers*, 866 S.W.2d at 528. Thus, pornographic magazines, like Hustler, Penthouse, and Playboy, must be put behind blinder racks, while books that contain serious and informative discussions about sexual acts need not. See pp. 23-24 & note 1, *supra*. COPA's serious value prong draws that same line. H.R. Rep. No. 775, *supra*, at 13 (COPA adopts the same standard as state harmful-to-minors display laws); *id.* at 27-28 (COPA incorporates the standard set forth in *Pope*).

That component of COPA, entirely ignored by the court of appeals, effectively limits COPA's reach to a narrow band of material.

Moreover, because the serious value prong does not incorporate community standards, appellate court enforcement of its limitations can be particularly effective. As this Court explained in *Reno* v. *ACLU*, the serious value prong "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." 521 U.S. at 873. The Virginia Supreme Court performed that function in *American Booksellers*, providing clear guidance on what must be placed behind blinder racks or otherwise shielded from examination by minors. 372 S.E.2d at 624. Appellate courts can perform the same function in enforcing COPA's serious value limitation.

Other elements of COPA also place legal limits on what may be found to fall within the scope of the statute. For example, material is covered by the first prong—appeal to the prurient interest—only if it is, "in some significant way, erotic." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 & n.10 (1975). That requirement excludes as a matter of law pictures of a nude baby, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. *Ibid.* It also excludes, as a matter of law, the seven-dirty-words monologue at issue in *Pacifica*, and other similar non-erotic uses of graphic language. See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739 (1978).

Similarly, material is covered by the second prong—"patent offensiveness"—only if it falls within one of the specifically defined categories of depictions: "an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd

exhibition of the genitals or post-pubescent female breast." 47 U.S.C. 231(e)(6)(B) (Supp. V 1999). Thus, COPA does not apply to a picture of a scantily clad belly dancer, the typical cover of Cosmopolitan or Vogue, or scenes from Britney Spears' Pepsi commercial, no matter how erotic some minors might find such depictions. Like the legal limitations on what can be found to lack serious value, the legal limitations on what can be found to satisfy the first two prongs of the harmful-to-minors statute can be enforced by a reviewing court. See *Jenkins* v. *Georgia*, 418 U.S. 153, 159-161 (1974) (establishing substantive limits on what may be deemed "patently offensive" with respect to adults, and stating that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive'").

Thus, all three prongs of the harmful-to-minors standard place effective legal limits on what can be found to fall within the scope of the statute. Together, they confine COPA's coverage "to materials that are clearly pornographic," while excluding as a matter of law "entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how controversial they may be for their political or sexual viewpoints." H.R. Rep. No. 775, *supra*, at 28. See also S. Rep. No. 225, *supra*, at 13 ("This definition ensures that the bill may not be construed as to restrict access to public health information, art, literature, and political information.").

E. Community Standards Concerning What Is Harmful To Minors Are Likely To Be Reasonably Constant

The constitutionality of applying community standards to the Web is further supported by Congress's judgment that, on the relevant issues, community standards are likely to be "reasonably constant" throughout the country. H.R. Rep. No. 775, *supra*, at 28. The court of appeals cast that judgment aside, finding no evidence that "adults everywhere in America would share the same standards for determining what is harmful for minors." Pet. App. 31a (emphasis deleted). Congress did not assume, however, that communities everywhere would have precisely the same understanding of what is prurient and patently offensive with respect to minors. Instead, Congress concluded that the standard applied to those issues is likely to be *reasonably* constant. As applied to the narrow band of material that lacks serious value for a legitimate minority of older minors and is not excluded from coverage under the first two prongs as a matter of law, that judgment is firmly grounded in common sense.

The exhibits introduced in this case provide a concrete context for assessing the reasonableness of Congress's judgment that community standards are likely to be "reasonably constant" throughout the country. See 2 C.A.J.A. 758-812 (Gov't Exhs.); *id.* at 601-757 (Pl's Exhs.).[4] As even a brief glance at the government exhibits in the court of appeals appendix reveals, all of them likely would be viewed as prurient and patently offensive with respect to minors throughout the country. A number of respondents' exhibits, by contrast, would be excluded from coverage as a matter of law by one or more of the three prongs of the harmful-to-minors standard. Some of respondents' exhibits, however, plainly do test, and likely exceed, the legal limitations imposed by those three prongs. But there is no reason to believe that those exhibits would be assessed

[4] "C.A.J.A." refers to the joint appendix filed in the court of appeals. That joint appendix has been lodged with this Court.

differently by different communities with respect to whether they are prurient and patently offensive for minors. Indeed, the court of appeals did not identify a single exhibit as to which coverage under COPA would depend on which community in the country evaluated the material.

Congress's judgment that community standards are likely to be reasonably constant in the present context does not conflict with the observation in *Miller* that communities throughout the country may vary on whether material is obscene for adults. Pet. App. 32a (quoting *Miller*, 413 U.S. at 30, 33). Even if the average adults in a particular locality or State might feel that adults should have relatively free access to pornographic material, there is no reason to believe that those same adults would want *minors* in the locality or State to be exposed to such material. Moreover, there is every reason to expect a far greater degree of agreement from community to community concerning what appeals to the prurient interest and is patently offensive with respect to minors on a nationwide and readily accessible medium like the Web.

Congress's direction that juries should be instructed in terms of an "adult" standard rather than a "geographic" standard further promotes a reasonably constant application of community standards. H.R. Rep. No, 775, *supra* at 28. That direction means that juries should not be instructed to consider the community standards of a particular geographic area, such as a city, town, judicial district, or State. Instead, as authorized by *Jenkins*, 418 U.S. at 157, a jury should be instructed to consider the standards of the adult community as a whole, without geographic specification, concerning what materials appeal to the prurient interest and are patently offensive with respect to

minors. To promote a reasonably constant application of standards, juries should also be instructed to take into account the fact that the Web is a national medium.

The possibility that the situs of the jury would matter in some cases cannot be discounted entirely. But "[t]he mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Miller*, 413 U.S. at 26 n.9.

F. COPA's Reliance On Community Standards Does Not Unduly Burden Speech

1. Because COPA sharply limits the material that is potentially covered, and there is little community-to-community variance as to the remainder, COPA's reliance on community standards does not impose an undue burden on speech. As we have discussed, COPA applies primarily to Web sites that are devoted to commercial pornography. The operators of those sites already put most of their material behind age verification screens. COPA's principal effect is to require those commercial pornographers to place their free teasers behind adult verification screens as well. Moreover, because all the pornographic material that commercial pornographers display is likely to offend community standards with respect to children throughout the country, they would have to put all such material behind age verification screens, regardless of whether it would be evaluated by a jury in the situs of the place of posting, a jury in Las Vegas, or a jury in Mississippi. *Miller*, 413 U.S. at 32. Any burden that COPA imposes on them cannot be attributed to variance in community standards.

COPA's reliance on community standards also imposes no costs on Web sites that display sexual material

that has serious value for a legitimate minority of older minors. The operators of those Web sites have no obligation to place their material behind a screen, and any variances in community standards are irrelevant for them. Similarly, because COPA applies only to entities that display harmful material regularly and for profit, see 47 U.S.C. 231(e)(2)(B) (Supp. V 1999), COPA's reliance on community standards does not impose any costs on commercial entities that display harmful-to-minors material on isolated occasions.

COPA's reliance on community standards also does not impose an undue burden on businesses that do not operate sites dedicated to pornography, but nonetheless regularly display material that may be harmful to minors. As to material that lacks serious value for older minors and is not excluded as a matter of law from the first two prongs, such businesses, like commercial pornographers, could not reasonably expect that juries in different communities would react differently to the material. They would therefore likely screen all such material, regardless of the relevant community standard. As a result, any burden they experience would not be attributable to a variance in community standards, but to the fact that material that is not excluded from the statute as a matter of law is reasonably likely to be prurient and patently offensive with respect to minors throughout the country.

2. Even if we assume that there nevertheless remains some meaningful variance in community standards, the sole consequence would be to require some additional age screening. That consequence does not unduly burden speech.

Web sites can easily set up a system for placing harmful material behind an adult verification screen. One adult verification service, Adult Check, will set up

such a system at no cost to the Web site. Pet. App. 75a. In fact, Web sites can earn substantial commissions from Adult Check if users sign up with Adult Check in order to view that Web site's screened content. *Ibid.* At the time of the district court's decision, nearly 46,000 Web sites were using Adult Check. *Id.* at 76a. A variance in community standards therefore would not impose an undue burden on commercial Web sites that regularly display material that may be harmful to minors.

Nor would a variance in community standards impose an undue burden on adults who wish to view material that might be found to be harmful to minors in some communities, but not others. At the time of the district court's decision, at least 25 services provided adult identification numbers that enabled users to gain access to screened content. Pet. App. 75a. Adults could obtain an Adult ID from Adult Check for $16.95 per year, and approximately three million people had a valid Adult Check PIN. *Id.* at 76a. COPA also removes disincentives to obtaining an Adult ID by requiring that information collected in that process must be kept confidential. 47 U.S.C. 231(d)(1) (Supp. V 1999).

As the district court found, some adults may still be deterred from obtaining an Adult ID. Pet. App. 89a. But since COPA provides significant privacy protections for adults who seek to obtain an Adult ID, and millions of adults have had no difficulty obtaining and using Adult IDs, the reluctance of some adults to obtain an Adult ID does not render COPA unconstitutional.

Any burden that COPA's reliance on community standards imposes, moreover, must be balanced against the interests that it serves. This Court has held that the government has a compelling interest in protecting children from pornographic material that is harmful to

them, even if the material is not obscene by adult standards, *Sable*, 492 U.S. at 126, and community standards are critical in serving that interest. See pp. 26-28, *supra*. Indeed, the court of appeals assumed for purposes of its decision in this case that "there may be no other means by which harmful material on the Web may be constitutionally restricted." Pet. App. 3a. In these circumstances, any burden that COPA's reliance on community standards imposes is outweighed by the interests it serves.

The cases upholding state display laws demonstrate that a statute that serves the compelling interest of protecting children from harmful material is not unconstitutional simply because it imposes some burden on adult access to pornographic material. For example, in *Crawford* v. *Lungren*, the plaintiffs claimed that a statute banning the sale of harmful matter in unsupervised sidewalk vending machines would "likely make it commercially infeasible for the publishers [of such matter] to distribute their materials through vending machines." 96 F.3d at 383. The Ninth Circuit nonetheless upheld the constitutionality of the statute, emphasizing that "[t]he statute provides two defenses which allow for the retention of newsracks," and that while those defenses "may impose some economic burden, they do enable the publishers to continue distributing their publications on streets." *Id.* at 388. Similarly, in *American Booksellers* v. *Webb*, the Eleventh Circuit upheld a state display restriction despite a district court finding that "in-store display of books" is "the cornerstone of the [bookselling] industry's marketing practices." 919 F.2d at 1498. In *M.S. News Co.* v. *Casado*, the Tenth Circuit upheld an ordinance requiring blinder racks in front of harmful-to minors material even though the court acknowledged that "compliance

with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected." 721 F.2d at 1288. Other courts have reached the same conclusion.[5]

G. COPA's Reliance On Community Standards Is Consistent With *Reno* v. *ACLU*.

In *Reno* v. *ACLU*, the Court noted that one feature of the CDA was that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 877-878. The Court made that observation, however, in connection with a statute that it found to be of unprecedented vagueness and breadth. In particular, the CDA applied to materials that were "indecent" or "patently offensive," without defining either term; it did not require that the covered material "appeal to the prurient interest"; it did not make clear whether the

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[5] See *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d at 1394 (upholding display ordinance that "limits to some extent the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults"); *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 526 (upholding display statute despite testimony that "blinder racks, accompanied by reasonable steps to prevent perusal by children, would disrupt business practices"); *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d at 625 (concluding that display statute "imposes a relatively light burden upon the bookseller, in contrast to the state's interest in protecting juveniles from materials harmful to them"); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d at 941 (dismissing "any inhibitory effect on dissemination to adults" in light of "the state's legitimate interest in shielding children from these materials"); but see *Tattered Cover*, 696 P.2d at 783-785 (state display law violates First Amendment where only means of compliance are commercially infeasible).

"indecent" and "patently offensive" determinations should be made with respect to adults or minors; and it did not require that covered material lack "serious literary, artistic, political, or scientific value." 521 U.S. at 865, 871, & n.37, 873, 877-878. The CDA also applied not only to commercial entities, but also to non-profit entities and individuals posting material on their computers. *Id.* at 856, 877. Given the breadth and vagueness of the CDA and the absence of any effective legal limits on what it encompassed, application of community standards effectively permitted the community most likely to be offended to determine the scope of the statute's coverage in most respects. In that context, the CDA's reliance on community standards exacerbated the inherent constitutional difficulties with the statute.

In COPA, Congress responded directly to the Court's concern about the unprecedented breadth and undefined parameters of the CDA. COPA defines harmful-to-minors material in terms that have been well understood since this Court's decision in *Ginsberg*; it does not cover material unless it is designed to appeal to the prurient interest of minors; it specifies the particular sexual acts and parts of the anatomy the depiction of which can be found to be patently offensive; it makes clear that the prurient interest and patently offensive determinations should be made "with respect to minors"; it does not cover material that has serious value for a legitimate minority of older minors; and it applies only to businesses that regularly and for profit display harmful-to-minors material. For the reasons we have discussed, in the context of that very different statute, a reliance on community standards does not raise independent constitutional concerns. Nothing in *Reno* v. *ACLU* suggests otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted.

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JULY 2001

ADDENDUM I

State laws that prohibit the sale to minors of harmful-to-minors material:

Ala. Code § 13A-12-200.5(1) (1994 & Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3506.A (West 2001), *re-printed in* as amended 2001 Ariz. Legis. Serv. Ch. 94 (West); Ark. Code Ann. § 5-68-502(2)(A) (Michie Supp. 1999); Cal. Penal Code § 313.1(a) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-502(1) (West 1986); Conn. Gen. Stat. § 53a-196 (1994); Del. Code Ann. tit. 11, § 1365(i) (1995); D.C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. Ann. § 847.012(2) (West 2000); Ga. Code Ann. § 16-12-103(a) (1999); Haw. Rev. Stat. § 712-1215(1) (1999 & Supp. 2000); Idaho Code § 18-1515.1 (1997); Ind. Code Ann. § 35- 49-3-3(1) (West 1998); Iowa Code Ann. § 728.2 (West 1993); Kan. Stat. Ann. § 21-4301c(a)(2) (1995); Ky. Rev. Stat. Ann. § 531-030(1) & commentary (Banks-Baldwin 1995); La. Rev. Stat. Ann. § 14:91.11(A)(1) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2911(2) (West 1983 & Supp. 2000); Mass. Ann. Laws ch. 272, § 28 (Law. Co-op. 1992); Minn. Stat. Ann. § 617.293 (West 1987 & Supp. 2001); Mo. Ann. Stat. § 573.040 (West 1995 & Supp. 2001); Mont. Code Ann. § 45-8-206(1)(b) (1999); Neb. Rev. Stat. § 28-808(1) (1995 & Supp. 2001); Nev. Rev. Stat. Ann. § 201-265.1 (Michie 1997); N.H. Rev. Stat. Ann. § 571-B:2.I (1986); N.M. Stat. Ann. § 30-37-2 (Michie 1997); N.Y. Penal Law § 235.21.1 (McKinney 2000); N.C. Gen. Stat. § 14-190.15(a) (1999); N.D. Cent. Code § 12.1-27.1-03 (1997); Ohio Rev. Code Ann. § 2907.31(A) (West 1997); Okla. Stat. Ann. tit. 21, § 1040-76.2 (West Supp. 2001); 18 Pa. Cons. Stat. Ann. § 5903(c) (West 2000 & Supp. 2001); R.I. Gen. Laws § 11-31-10(b) (2000); S.C. Code Ann.

§ 16-15-385(A) (Law. Co-op. Supp. 2000); S.D. Codified Laws § 22-24-28 (Michie 1998); Tenn. Code Ann. § 39-17-911(a) (1997 & Supp. 2000); Tex. Penal Code Ann. § 43.24(b) (West 1994); Utah Code Ann. § 76-10-1206(1)(a) (1999 & Supp. 2000); Vt. Stat. Ann. tit. 13, § 2802(a) (1998 & Supp. 2000), *reprinted in* as amended 2001 Vt. Acts & Resolves 41, § 6; Va. Code Ann. § 18.2-391.A (Michie Supp. 2000), *reprinted* as amended 2001 Va. Acts ch. 451, § 1; Wash. Rev. Code Ann. 9.68.060(3)(d) (West 1998); Wis. Stat. Ann. § 948.11(2) (West 1996 & Supp. 2000).

ADDENDUM II

State laws that prohibit the display of harmful-to-minors material:

Ala. Code § 13A-12-200.5(2)a. (Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3507 (West 2001); Ark. Code Ann. § 5-68-502(1)(A) (Michie Supp. 1999); Cal. Penal Code § 313.1(c)(2) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-502(5) (West 1986); Del. Code Ann. tit. 11, § 1365(i) (1995); Fla. Stat. Ann. § 847.0125(2) (West 2000); Ga. Code Ann. § 16-12-103(e) (1999); Ind. Code Ann. § 35-49-3-3(2) (West 1998); Iowa Code Ann. § 728.2 (West 1993); Kan. Stat. Ann. § 21-4301c(a)(1) (1995); La. Rev. Stat. Ann. § 14:91.11(A)(1) and (B) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2912 (West 1983 & Supp. 2000); Minn. Stat. Ann. § 617.293.2 (West Supp. 2001); Mont. Code Ann. § 45-8-206(1)(a) (1999); Nev. Rev. Stat. Ann. § 201-265.2 (Michie 1997); N.M. Stat. Ann. § 30-37-2 (Michie 1997); N.C. Gen. Stat. § 14-190.14 (1999); Ohio Rev. Code Ann. § 2907-311 (West 1997); Okla. Stat. Ann. tit. 21, § 1040.76.1 (West Supp. 2001); 18 Pa. Cons. Stat. Ann. § 5903(a)(1) (West 2000 & Supp. 2001); R.I. Gen. Laws § 11-31-10(b) (2000); Tenn. Code Ann. § 39-17-914 (1997 & Supp. 2000); Vt. Stat. Ann. tit. 13, § 2804b (1998); Va. Code Ann. § 18.2-391.A (Michie Supp. 2000), *reprinted in* as amended 2001 Va. Acts ch. 451, § 1.

ADDENDUM III

State laws that incorporate community standards into harmful-to-minors definitions:

Ala. Code § 13A-12-200.1(11) (Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3501.1 (West 2001), *reprinted in* as amended 2001 Ariz. Legis. Serv. Ch. 94 (West); Ark. Code Ann. § 5-68-501(2) (Michie Supp. 1999); Cal. Penal Code § 313.1(a) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-501(2) (West 1986); Conn. Gen. Stat. § 53a-193(2) (1994); Del. Code Ann. tit. 11, § 1365(a)(1) (1995); D.C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. Ann. § 847.001(3) (West 2000), *reprinted in* as amended 2001 Fla. Sess. Law Serv. Ch. 2001-54 (West); Ga. Code Ann. § 16-12-102(1) (1999); Haw. Rev. Stat. § 712-1210(7) (1999); Idaho Code § 18.1514.6 (1997); Ind. Code Ann. § 35-49-2-2 (West 1998); Iowa Code Ann. § 728.1.5 (West 1993 & Supp. 2001); Kan. Stat. Ann. § 21-4301c(d)(2) (1995); La. Rev. Stat. Ann. § 14:91.11(A)(2) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2911.1(D)(1) (West 1983 & Supp. 2000); Mass. Ann. Laws ch. 272, § 31 (Law. Co-op. 1992); Mich. Comp. Laws Ann. § 722.674(a) (West 1993); Minn. Stat. Ann. § 617.292.7 (West 1987); Mo. Ann. Stat. § 573-010(11) (West Supp. 2001); Mont. Code Ann. § 45-8-205(1) (1999); Neb. Rev. Stat. § 28-807(6) (1995); Nev. Rev. Stat. Ann. § 201-257 (Michie 1997); N.H. Rev. Stat. Ann. § 571-B:1.I (1986); N.M. Stat. Ann. § 30-37-1.F (Michie 1997); N.Y. Penal Law § 235.20.6 (McKinney 2000); N.C. Gen. Stat. § 14.190.13(1) (1999); N.D. Cent. Code § 12.1-27.1-02.2 (1997); Ohio Rev. Code Ann. § 2907.01(E) (West 1999); Okla. Stat. Ann. tit. 21, § 1040-75.2 (West Supp. 2001), *reprinted in* as amended 2001 Okla. Sess. Law Serv. ch. 387 (West); 18 Pa. Cons. Stat. Ann.

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(13)

No. 00-1293

Supreme Court, U.S.
FILED
SEP 20 2001
CLERK

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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43 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the criminal and civil provisions of a federal law, the Child Online Protection Act, 47 U.S.C. § 231, violate the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; BlackStripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Internet, Inc.; and West Stock, Inc., now known as ImageState North America, Inc. The plaintiff Internet Content Coalition is no longer in existence.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents refer to the Corporate Disclosure Statement in respondents' Brief in Opposition to Certiorari, with the following amendments:

1) Respondent Internet Content Coalition is no longer in existence.

2) PlanetOut Corporation now has a parent corporation, PlanetOut Partners, Inc. JP Morgan Partners and affiliated entities of JP Morgan Partners together hold more than 10% of the shares issued and outstanding of PlanetOut Partners, Inc. AOL Time Warner Inc. does not hold more than 10% of the shares issued and outstanding of PlanetOut Corporation or PlanetOut Partners, Inc.

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STATEMENT OF THE CASE

A. Introductory Statement And Proceedings Below

This case concerns the Child Online Protection Act ("COPA"), 47 U.S.C. § 231(1998), Congress' second attempt to impose severe criminal and civil sanctions on the display of protected, non-obscene speech on the Internet. COPA targets speech on the World Wide Web (the "Web") that is harmful to minors according to "contemporary community standards." The first attempt to restrict protected speech on the Internet was declared unconstitutional by all nine justices of this Court in *Reno v. ACLU*, 521 U.S. 844 (1997) ("*ACLU I*") (affirming preliminary injunction against the Communications Decency Act (the "CDA") 47 U.S.C. §223 (1996)). Recognizing that the Internet is a powerful "new marketplace of ideas" and "vast democratic for[um]" that is "dramatic[ally] expand[ing]" in the *absence* of government regulation, the Court imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech. *ACLU I*, 521 U.S. at 870, 885.

Plaintiffs filed this challenge to the constitutionality of COPA in 1998. Joint Appendix ("J.A.") 103. Based on live testimony, sworn declarations, and numerous exhibits, the district court first granted a temporary restraining order against COPA on November 20, 1998, which was extended on consent. Pet. App. 42a-43a, 112a-114a. Plaintiffs then moved for a preliminary injunction. The district court heard five days of live testimony from 10 witnesses and admitted approximately 18 sworn declarations and over 400 exhibits. *Id.* 43a, 64a n.5. The parties also stipulated to twenty facts. *Id.* 55a-62a, ¶¶ 0-19. One of those stipulations agreed that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot

prevent that content from entering any geographic community." *Id.* 62a, ¶ 18. As documented below, much of the actual record directly contradicts the limited legislative findings relied on by Congress and petitioner.

After hearing "extensive" evidence, *id.* 12a, the district court granted a preliminary injunction, finding that plaintiffs were likely to succeed on the merits of their claim that COPA violated the First Amendment. *Id.* 98a. The court found that the government had not met its burden of establishing that COPA was narrowly tailored. *Id.* 91a-95a. Because any attempt by Web speakers to verify the age of readers would prevent adults from access to constitutionally protected speech, the district court held that COPA failed strict scrutiny. *Id.* 93a.

The court of appeals affirmed, finding an alternative basis for COPA's unconstitutionality. *Id.* 39a. The court of appeals specifically upheld the district court's findings of fact and noted that they were undisputed by the parties. *Id.* 12a. Because Web speakers are unable to verify the geographic location of readers, the court of appeals held that COPA would subject all speech on the Web to the most restrictive community's standards. *Id.* 21a-36a. In affirming, the court of appeals found that the government had presented "*no evidence* to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors." *Id.* 31a (first emphasis added).

B. The Reach Of COPA: Plaintiffs And Their Speech

Plaintiffs "are a diverse group of speakers" on the Web. *Id.* 63a, ¶ 24. They "post, read, and respond to content including, *inter alia*, resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about

books and stock photograph images offered for sale; and online magazines." *Id.* 63a, ¶ 21. Though they provide virtually all of their online information for free, they all communicate with the objective of making a profit. *Id.* 63a, ¶ 23, 68a-69a, ¶ 33. They sue on their own behalf and on behalf of their readers.

Plaintiffs include Web sites maintained by individuals. For instance, Mitchell Tepper of the Sexual Health Network runs his Web site out of his home. *Id.* 65a, ¶ 25. "The mission of his Web site is to provide easy access to information about sexuality geared toward individuals with disabilities." *Id.* The site "is almost exclusively sexual in nature and ... contains, for example, information on sexual surrogacy as a form of sexual therapy and advice on how a large man and a small woman should position themselves comfortably for intercourse." *Id.* The Sexual Health Network also has an interactive component through which readers can post questions and receive answers on topics such as how disabled persons can experience sexual pleasure. *Id.*

Plaintiffs also include large and highly popular Web sites. Salon Internet, Inc. ("Salon") is a leading general interest online magazine featuring articles on current events, the arts, politics, the media, and sexuality. J.A. 139-40 (Talbot Testimony). Salon publishes a regular column entitled "Sexpert Opinion" by author and sex therapist Susie Bright, including sexually frank articles such as "Move over Ken, it's 'Bend Over Boyfriend,'" and "Beatings, eatings and other ass-candy." *See generally* J.A. 617-33 (Salon PI Exhs.). Salon reports extensively on politics, including widely-noted coverage of the story involving President Clinton and Monica Lewinsky. J.A. 139 (Talbot Testimony). Salon also hosts a very popular set of discussion groups called "Table Talk," to which approximately three thousand messages are posted each

day, on topics such as "Can boys find the right spot?" J.A. 147-49 (Talbot Testimony); J.A. 638-41 (Salon PI Exhs.). Salon archives its content, and its Web site contains tens of thousands of pages published over the last three years. J.A. 145 (Talbot Testimony).

Plaintiff PlanetOut is a Web site that acts as an online community for gay, lesbian, bisexual and transgendered people. The site includes, among other things, a bulletin board and chat rooms where users can discuss lesbian sexuality and post personal ads, including descriptions of their sexual interests and physical characteristics, and where teenagers who live in remote locations can discuss their sexual orientation. Pet. App. ¶ 66a, ¶ 26; J.A. 652-53, 661-69 (PlanetOut PI Exhs.). The site is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reaction of others. Pet. App. 66a, ¶ 26.[1]

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1 Other plaintiffs include Condomania, a leading online seller of condoms and distributor of safer-sex related materials; ArtNet, the leading online vendor of fine art on the Web; Free Speech Media, which promotes extensive independent audio and video content on the Web; OBGYN.net, a comprehensive international online resource on obstetrics and gynecology; Powell's Bookstore, a large new and used bookstore with a Web site containing information on over one million books; Electronic Frontier Foundation; Electronic Privacy Information Center; RiotGrrl, a popular "Webzine" that advocates positive empowerment for women; WestStock, an online seller of stock photographic images; BlackStripe, a Web-based resource for gay and lesbian individuals of African descent; American Booksellers Foundation for Free Expression, an organization that includes bookstores on the Web; and Philadelphia Gay News, which operates a Web site. *See ACLU v. Reno* ("*ACLU II*"), Pet. App. 64a n.5; *see generally* J.A. 601-757, Supplemental Lodging ("S.L.") 65-78 (Plaintiffs' PI Exhibits); J.A. 106-159, 325-79, S.L. 1-3 (Plaintiffs' Testimony); S.L. 4-64 (Plaintiffs Decls. & Exhs.). One of the plaintiffs in the district court was the Internet Content Coalition, a non-profit professional association of well-known content providers including The New York Times, Reuter's, CBS News Media, CNET, and MSNBC. The Internet Content Coalition no longer exists.

Plaintiffs all engage in some speech that is sexual in nature and constitutionally protected for adults. Pet. App. 52a. The government has never asserted that any are "commercial pornographers." Although the government argued below that none engaged in speech that was "harmful to minors," Pet. App. 51a, the government now asserts that at least some are engaged in illegal speech. Brief for the Petitioners ("Gov. Br.") at 37. Thus, the government now concedes that the law criminalizes speech by people other than "commercial pornographers."

C. The Challenged Statute

COPA imposes severe criminal and civil penalties[2] on persons who:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, make[] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors . . . .

47 U.S.C. § 231(a)(1)-(3).

COPA defines "commercial purposes" as being "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). COPA then defines "engaged in the business" as meaning:

> that the person who makes a communication, or offers to make a communication, by means

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2 Violation of COPA subjects speakers to up to six months imprisonment and/or $50,000 in fines, plus additional fines for each intentional violation. 47 U.S.C. § 231(a).

> of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

47 U.S.C. § 231(e)(2)(B).

Section 231(c)(1) of COPA provides an affirmative defense to prosecution if the defendant, "in good faith, has restricted access by minors to material that is harmful to minors – (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1); *see also* 47 U.S.C. § 231(b).

D. COPA's Impact On Protected Speech

The district court found that Web speakers "cannot know who is accessing their sites, or from where, or how old the users are unless they take affirmative steps to gather information from the user and the user is willing to give truthful responses." Pet. App. 89a. The government itself stipulated that it is not possible for any Web speaker to know the geographic location of any reader. Pet. App. 62a. Consistent with this stipulation, there was no testimony about any technologies that could verify the geographic location of readers. The government's current assertion to the contrary is contradicted by its own stipulation and unsupported by the record. *See* Gov. Br. at 16, 29 n.3; *see also* Section II(B) *infra* .

Apparently recognizing that Web speakers are unable to ascertain the age of their readers, COPA contains three affirmative defenses to Web speakers who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* Pet. App. 46a, 70a-71a, ¶ 37. The district court found, and the government does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* 70a-71a, ¶ 37. Further, there are "no other reasonable measures" available to restrict access to minors. *Id.* Thus, the only technologies currently available for compliance with COPA are credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity before gaining access to restricted content. *Id.*

"Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults." *Id.* 105a. As the district court found and the court of appeals affirmed, given the nature of the Web, even with these defenses COPA would prevent or deter both adults and minors from accessing protected speech. *Id.* 89a-90a.

Expert testimony established that approximately one third of the 3.5 million sites on the Web are commercial, i.e., they "intend to make a profit." *Id.* 67a, ¶ 27. By far the most popular business model is the advertiser supported or sponsored model, "in which nothing is for sale, content is provided for free, and advertising on the sites is the source of all revenue." *Id.* 68a, ¶¶ 30, 31; J.A. 207 (Hoffman Testimony). Fee-based models are the least popular. *Id.* 68a, ¶ 31. Web businesses are valued according to "the number of customers they believe the Web site is able to attract and retain over time, or 'traffic.'" *Id.* 69a, ¶ 34; *see*

also J.A. 216-20 (Hoffman Testimony). Traffic is "the most critical factor for determining success or potential for success on a Web site." Pet. App. 69a, ¶ 34. "The best way to stimulate user traffic on a Web site is to offer some content for free to users . . . . [V]irtually all Web sites offer at least some free content." *Id.*

Because the "vast majority of information . . . on the Web . . . is provided to users for free," *id.* 63a, ¶ 23, the court found that COPA's registration requirements would deter most Web readers. *Id.* 89a. The plaintiffs testified that, because of privacy concerns, users would simply forego accessing their material if forced to provide a credit card or adult access code. For example, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." *Id.* 66a, ¶ 26; *see also* J.A. 133-35, 138, 156 (Laurila Testimony). One of PlanetOut's competitors which required identification saw its membership stagnate at 10,000, compared to the 350,000 PlanetOut members and two million PlanetOut readers. Pet. App. 66a-67a, ¶ 26; J.A. 355, 368-69 (Reilly Testimony).

Many of the plaintiffs' readers and other Web users are even more reluctant to identify themselves because the information they seek is intensely personal, sensitive, or controversial. Mr. Tepper of the Sexual Health Network, for example, testified that some of his readers would simply not go to his site if they had to identify themselves. Pet. App. 65a, ¶ 25. His site aims to provide information about sexuality to disabled persons who will only seek it anonymously. Similarly, many gay or lesbian people who are "closeted" rely on a Web site such as PlanetOut "because it allows closeted people access to this information while preserving their anonymity." *Id.* 66a-67a, ¶ 26.

In addition, COPA burdens speech that is not even targeted by the statute. Web speakers often draw and retain readers to their sites by sponsoring chat rooms, bulletin boards, and other interactive features that use Web-based protocols. *Id.* 59a, 69a, ¶ 35. It is undisputed that in order to comply with COPA, plaintiffs would have to place *all* interactive speech behind credit card or age verification screens even if the speech is not harmful to minors. *Id.* 79a, ¶ 58, 90a. "Because of the dynamic nature of the content of such interactive fora, there is no method by which the creators of those fora could block access by minors to harmful to minors materials and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.* 79a, ¶ 58. The government's implication that COPA does not apply to interactive speech, *see* Gov. Br. at 9-10, 25-26, is thus contradicted by the record. In addition, a single Web page may have some content prohibited under COPA and some that is not. "Text is more difficult to segregate than images," and so COPA would also force Web speakers to block entire Web pages, even if much of the page's text is not harmful to minors. Pet. App. 77a-78a, ¶ 55.

E. Additional Burdens Of Utilizing Credit Cards Or Adult Access Codes

In addition to the strong deterrent effect of COPA's screening requirements, the district court identified several other burdens that COPA's defenses would impose on Web speech. Not all Web sites even have the ability to set up credit cards or adult access services to screen readers. For example, the defenses are completely unavailable to any Web site hosted by America Online and similar Internet service providers that do not allow fill-in-the-blank screens. *Id.* 73a, ¶ 44; J.A. 392 (Farmer Testimony). These Web speakers would have no choice but to eliminate all "harmful" content on their sites or risk criminal prosecution.

Even if Web sites could utilize credit card or adult access services as a surrogate for age, they would incur "substantial financial costs." Pet. App. 37a. First, Web speakers would have to segregate content into that which is potentially "harmful to minors" and that which is not. *Id.* 77a-79a, ¶¶ 54-58. For speakers with large Web sites, faced with jail time for their mistakes, this process could be quite difficult. *Id.* 71a, ¶ 39, 78a, ¶ 56.

Second, speakers would have to pay start-up costs ranging from "$300 . . . to thousands of dollars." *Id.* 72a, ¶ 42. The government was unable to prove that credit card verification services "will authorize or verify a credit card number in the absence of a . . . [financial] transaction." *Id.* 73a, ¶ 45. Without such a service, Web speakers would also have to pay per-transaction costs every time a user accessed restricted content. These fees would allow users hostile to certain content to drive up costs to the speaker by repeatedly accessing it. J.A. 133 (Laurila Testimony).

Utilizing the adult access code defense would impose additional burdens. There are dozens of adult access code services, which cater to the commercial pornography industry, and each one of which requires users to pay a separate fee. J.A. 348 (Tepper Testimony), 402-03 (Farmer Testimony). Users could thus be required to pay multiple fees in order to access all of the content they wish to see. In addition, adult access codes are issued only after a person submits a variety of authoritative identifying information and, usually, submits a credit card. Pet. App. 76a, ¶ 51; J.A. 439 (Alsarraf Testimony). Plaintiffs testified, without contradiction, that their users would not want to be associated with the "adult" access code industry, and would instead forego accessing the plaintiffs' content. J.A. 330-31, 347-52, 367-68, 370 (Barr, Tepper, Reilly Testimony). For example, persons seeking access to the mainstream CNET news site, or a disabled person wanting accurate information

about sexual functioning from the Sexual Health Network, would not want to provide personal information to verification services associated with the pornography industry. J.A. 330-31 (Barr Testimony); J.A. 344, 349 (Tepper Testimony).

In summary, the record contradicts the government's assertion, Gov. Br. at 9, that credit cards and adult access codes are technologically and economically feasible. The district court concluded that using a credit card or adult verification screen would "deter users from accessing such materials and ... the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 89a. Especially when faced with the risk of imprisonment, many speakers would self-censor rather than set up age verification systems that their readers would not use. *Id.* 90a.

F. Alternatives To COPA

COPA does not restrict the wide range of harmful-to-minors materials provided non-commercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *Id.* 93a. The law would also fail to protect minors from the forty percent of Web content that originates abroad. *Id.* 62a, ¶ 20, 93a. Conversely, as the government's expert conceded, user-based blocking software can effectively block these materials, in addition to blocking Web-based commercial materials. *Id.* 81a-82a, ¶ 65. User-based blocking software can also block other content that parents may deem inappropriate, such as violence or hate speech. J.A. 314 (Magid Testimony). To establish these controls, parents may either purchase software for their home computers or choose an Internet service provider or online service such as America Online that offers parental software controls. Pet. App. 81a-82a, ¶ 65; J.A. 309 (Magid Testimony). Available tracking and monitoring software can also determine which

resources a child has accessed, and offer access to children-only discussion groups that are closely monitored by adults. J.A. 317-18 (Magid Testimony).[3]

SUMMARY OF THE ARGUMENT

Because the extensive trial record in this case overwhelmingly supports the preliminary injunction against COPA, the government ignores it. Remarkably, the government brief cites almost exclusively to legislative findings, many of which are directly contradicted by the record. *See* Stmt. of the Case, *supra* at 7, 10-12. The Constitution, of course, requires the government to prove that COPA survives strict scrutiny by convincing a court with "actual facts" legitimized by the safeguards of the judicial process. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). In particular, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* "Were it otherwise, the scope of freedom of speech . . . would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id.* at 844; *see also Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000).

The record establishes that COPA violates the central principal of *ACLU I*, in which this Court struck down the CDA. Both statutes, in their attempt to deny minors access to certain speech, "effectively suppress[] a large amount of speech that adults have a constitutional right to receive and to address to one another." *ACLU I*, 521 U.S. at 874; *see also* Pet. App. 29a, 90a. The CDA made it a crime to communicate material that was "indecent" or "patently offensive" on the Internet. 47 U.S.C. § 223(a),

3 *See also* Amicus Curiae Brief on Behalf of the Computer & Communications Industry Association, et al.

(d)(1). COPA makes it a crime to communicate material on the Web for commercial purposes that includes any material that is "harmful to minors." 47 U.S.C. § 231(a)(1).

Both the CDA and COPA are criminal statutes, which pose a very strong risk that they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU I*, 521 U.S. at 872; Pet. App. 95a. Both apply to speech that is constitutionally protected for adults. Both effectively prevent adults from receiving speech because there is no way to prevent minors from obtaining communications on the Web without also deterring and burdening access by adults. *See ACLU I*, 521 U.S. at 876-77; Pet. App. 89a-90a, 95a. Both statutes contain nearly identical affirmative defenses that protect only speakers that can prove they restrict prohibited content by requiring a credit card or adult access code; trial courts in both cases found that these defenses do not cure the statutes' censorship of protected speech. *See ACLU I*, 521 U.S. at 881-82; *see also* Pet. App. 90a.

In addition, as the court of appeals correctly held, COPA—like the CDA—imposes "community standards" on a medium that knows no geographical boundaries, and thus allows "any communication available to a nationwide audience [to] be judged by the standards of the community most likely to be offended by the message." *ACLU I*, 521 U.S. at 877-78; Pet. App. 27a, 29a.

Contrary to the government's argument, none of the differences between the two statutes are constitutionally significant. For example, the government stresses that COPA applies only to material communicated through the Web whereas the CDA applied to all forms of communication on the Internet. *See* Gov. Br. at 8-9. Yet the record shows that the volume and breadth of protected

speech targeted by COPA—like the CDA—is staggering. *See* Stmt. of the Case, *supra* at 2-5, 8; Section I(A), *infra*. Furthermore, the district court specifically found that COPA applies to millions of Web-based interactive messages. Because there is no way to screen individual messages in these fora, COPA would require age-screening for *all* of their millions of communications *regardless of whether they contain material prohibited by the statute*. *See* Pet. App. 79a, ¶58.

Likewise, although COPA purportedly restricts only speech provided "for commercial purposes," *see* Gov. Br. at 10, it applies to all speech provided for free on the Web by a commercial entity, not merely speech that proposes a commercial transaction. COPA sweeps in any individual or organization communicating with the objective of making a profit, whether by promoting and selling products over the Web or by selling space to advertisers or members. *See* Pet. App. 52a-53a, 63a-67a, ¶¶ 21-26. The government also makes much of the fact that COPA, unlike the CDA, tracks the "harmful to minors" standard this Court approved in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968). By definition, though, that standard is unconstitutional if applied to censor adult communications. *See, e.g., Fabulous Assocs. v. Pennsylvania Pub. Util. Comm'n*, 693 F. Supp. 332, 335 (E.D. Pa. 1988) ("[I]t is not enough that the variable standard may be constitutional as applied to minors, since it is being applied as a restriction on adults' access to protected speech."), *aff'd*, 896 F.2d 780 (3d Cir. 1990).

Given the close parallels between the CDA and COPA as established by the record, the government itself concedes that COPA would prevent adults from receiving protected speech. *See* Gov. Br. at 39-42. Ultimately, its only argument is that because COPA is not *quite* as censorious as the CDA, it should be upheld. A law banning books does not

become constitutional because it is re-written to remove only every *other* book on the shelves. Content-based bans are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the government has the burden to prove that such laws are narrowly tailored to serve a compelling interest. *ACLU I*, 521 U.S. at 870, 874. As the record establishes, the government did not meet that burden in this case. Thus, the holdings of both the district court and the court of appeals are correct under *ACLU I*, and this Court should likewise affirm the preliminary injunction against COPA's criminal and civil penalties on protected speech.[4]

ARGUMENT

I. COPA IS CLEARLY OVERBROAD AND FAILS STRICT SCRUTINY

A. COPA Suppresses A Wide Range Of Speech Protected For Adults

Once a speaker posts content on the Web, it is available to all other Web users worldwide. J.A. 114, 145, 148; *see also ACLU I*, 521 U.S. at 853. It is not technologically possible for a speaker to know the age of a user who is accessing her communications on the Web. *See* Pet. App. 89a; *see also ACLU I*, 521 U.S. at 855, 876.

In order to avoid the risk of criminal prosecution and civil penalties, on its face COPA requires Web speakers to deny both minors and adults access to any speech that may

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4 The district court's issuance of a preliminary injunction against COPA should stand unless respondents can prove an "abuse of discretion." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring). Legal conclusions are reviewed *de novo*, and findings of fact are reviewed for clear error. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Of course, the Court can affirm on any ground supported by the law and record. *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

be considered "harmful to minors." In striking down the CDA's prohibitions on transmitting indecency to minors by means of the Internet, this Court held that while "we have repeatedly recognized the governmental interest in protecting children from harmful materials . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. COPA is similarly invalid because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 874.

Even if this Court had not already decided the constitutionality of a substantially identical statute, COPA's civil and criminal penalties would be clearly unconstitutional under this Court's well-established precedents. In its attempt to deny minors access to certain speech, COPA criminalizes the communication of expression that is clearly protected by the Constitution for adults. The government may not justify the suppression of constitutionally-protected speech under the guise of protecting children. Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Court has *never* upheld a criminal prohibition on non-obscene communications between adults. *Id.* at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotation marks omitted)); *see also Sable*, 492 U.S. at 131 (invalidating a conviction for distribution of indecent publications); *Bolger*, 463 U.S. at 74 (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (invalidating a

conviction for distribution of indecent publications).[5] The Court has uniformly rejected such attempts to "burn the house to roast the pig." *Butler*, 352 U.S. at 383.

This Court has also recently rejected even non-criminal speech regulations that attempt to "'reduc[e] the adult population . . . to . . . only what is fit for children.'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (invalidating law requiring cable television operators to segregate and block "patently offensive" content on certain channels); *see also Playboy*, 529 U.S. at 813 (invalidating law requiring cable television operators to scramble channels); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2426 (2001) (invalidating tobacco advertising restrictions aimed at preventing children from viewing such advertising).

Just as in prior cases, the category of speech that COPA prohibits includes a wide range of speech that is unquestionably constitutionally protected for adults. *See ACLU I*, 521 U.S. at 874 ("'[s]exual expression which is . . . not obscene is protected by the First Amendment'") (quoting *Sable*, 492 U.S. at 126); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

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5 *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" to adults); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that "*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them").

The record is full of examples that illustrate the breadth of the protected speech that COPA targets:

- ArtNet's Web site displays photographs from Andres Serrano's series "A History of Sex." J.A. 710-13 (ArtNet PI Exhs.).
- OBGYN.net discusses issues such as birth control, sexual satisfaction, and sexually transmitted diseases. J.A. 716-27 (OBGYN.net PI Exhs.).
- The Sexual Health Network covers topics from the use of sex toys to sexual surrogacy. J.A. 340, 673, 681-85 (Tepper Testimony and PI Exhs.).
- ACLU member Patricia Nell Warren's Web site includes a graphic account of a fifteen-year-old who was date-raped when she was thirteen. J.A. 732-36 (Warren PI Exhs.).
- A Different Light's site contains an article describing a gay author's first experience of masturbation. J.A. 609-12 (Laurila PI Exhs.).
- Salon publishes Susie Bright's columns describing her sexual experiences including anally penetrating her boyfriend and having sex outdoors. J.A. 617-26 (Talbot PI Exhs.).
- PlanetOut offers archives of an Internet radio show called "Dr. Ruthless" that discusses topics such as anal sex and masturbation. J.A. 658-60 (Reilly PI Exhs.).
- RiotGrrl's articles include explicit descriptions of an author's first experience with oral sex. J.A. 745-48 (Douglas PI Exhs.).
- BlackStripe's Web site contains James Earl Hardy's article *Black-on-Black Love: It Ain't A*

'Revolutionary Act,' which opens by asking "How do you challenge the white cock you're sucking?" J.A. 753-57 (Tarver PI Exhs.).

Popular chat rooms and discussion boards involving sexual topics are also covered. COPA would criminalize PlanetOut's forty chat rooms about gay sexuality and OBGYN.net's numerous daily postings about pregnancy and sexually transmitted diseases. *See* J.A. 359 (Reilly Testimony), 716 (OBGYN.net PI Exhs.). Given the popularity of interactive messages and the more than one million commercial Web sites, the examples above are far from isolated. Pet. App. 67a, ¶ 27. *See also* Amicus Curiae Brief on Behalf of American Society of Journalists & Authors, et al. While such content is appropriate for adults, there is no doubt that some communities would find it "harmful to minors."

The government contends that COPA is "directed primarily to commercial pornographers" and that its "principal effect . . . is to require those commercial pornographers to put their teasers behind age verification screens." Gov. Br. at 18. But the government itself argues that some of the plaintiffs' exhibits are illegal under COPA, *see* Gov. Br. at 37, even though none of the plaintiffs in this case are commercial pornographers or have "teasers." In fact, as the district court held, "[t]here is nothing in the text of COPA ... that limits its applicability to so-called commercial pornographers only." Pet. App. 52a. COPA also expressly covers "writing[s]," "recording[s]," and "article[s]," not just commercial pornographic images. 47 U.S.C. § 231(e)(6).

Although COPA is limited to communications made "for commercial purposes," on its face COPA applies to *any* Web site that, in the regular course of business, communicates any speech that includes any material that is

harmful to minors. 47 U.S.C. § 231(a)(1); 47 U.S.C. § 231(e)(2)(B). The speaker is "engaged in the business" of making prohibited communications if she "devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit." 47 U.S.C. § 231(e)(2)(A)-(B). The statute specifically notes that speakers are subject to prosecution even if providing "harmful" materials is not their "sole or principal business or source of income." 47 U.S.C. § 231(e)(2)(B).

Instead of limiting its reach to commercial pornographers, COPA broadly applies to all speech on the Web—even speech provided for free—if the speaker is engaging in some business through which she merely hopes to make a profit through advertising or other means. Plaintiff BlackStripe, for example, provides Web users with a free Web-based forum to obtain and discuss information pertaining to same-gender-loving individuals of African descent, and is funded, in part, by selling space on the Web site to advertisers. *See* J.A. 75-76; *see also* J.A. 753-57 (BlackStripe PI Exhs.). Similarly, plaintiff OBGYN.net provides its medical-related content free to Web users and is funded through advertising and sponsorship. *See* J.A. 88, 716-27 (OBGYN.net PI Exhs.).

As the district court noted and the Third Circuit affirmed, "the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that *includes any material* that is harmful to minors.'" Pet. App. 52a (emphasis added). In fact, Congress specified *three times* that communications covered by COPA "include[] any material" that may be deemed harmful to minors. *See* 47 U.S.C. § 231(a)(1); § 231(e)(2)(B) (twice). Based on COPA's own definitions, the district court correctly held that "[b]ecause COPA applies to communications which *include*, but are not necessarily

wholly comprised of material that is harmful to minors, it logically follows that it would apply to *any* Web site that contains only some harmful to minors material." Pet. App. 52a (emphasis added). Thus, any harmful-to-minors material posted on a Web site—even a single book review of "The Topping Book, or, Getting Good at Being Bad" on the Web site of plaintiff A Different Light Bookstore, J.A. 603 (Laurila PI Exhs.), or one Serrano photograph on the Web site of plaintiff ArtNet, J.A. 713 (ArtNet PI Exhs.)—would subject the speaker to COPA's civil and criminal penalties. COPA effectively criminalizes all Web sites that contain even a single example of content that may be harmful to minors, and the government's interpretation of the statute as applying only to commercial pornographers would deny any meaning to the statute's explicit wording.[6]

B. COPA's Affirmative Defenses Do Not Save The Statute, Because They Would Prevent Or Deter Adult Web Users From Accessing Protected Speech

Essentially conceding that COPA would be clearly unconstitutional without its affirmative defenses, the government argues that those defenses save the statute. The government ignores both the clear findings of the district court and this Court's holding in *ACLU I* that identical affirmative defenses were not sufficient to save an otherwise unconstitutional act. *See ACLU I*, 521 U.S. at 881-82; Pet. App. 89a-90a.

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6 COPA's definition of "harmful to minors" also requires material to be judged "as a whole." 47 U.S.C. § 231(e)(6)(C). It is unclear how to apply this standard to the Web, where speech by different content providers and on different computers around the world is seamlessly linked together. The government apparently concluded that some plaintiffs are liable based on single pages viewed in isolation from the Web sites as a whole. *See* Gov. Br. at 17.

The only way for a speaker who displays "harmful to minors" materials to avoid conviction under COPA is to invoke one of the Act's "affirmative defenses."[7] *See* 47 U.S.C. § 231(c)(1)(A). COPA provides three affirmative defenses to Web speakers who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* Pet. App. 70a-71a, ¶ 37.

The district court found, and the government does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* Further, there are "no other reasonable measures" available to restrict access to minors. *Id.* Thus, the uncontested evidence shows that the only technologies currently available for compliance with COPA are credit cards and adult access codes—precisely the same technologies considered by this Court in *ACLU I* and rejected as insufficient to save the statute.[8] Recognizing the weakness

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7 COPA's criminal penalties would have a strong chilling effect even on those speakers who may have the ability to implement a defense. The defenses are affirmative defenses only, and "in no way shield[] a content provider from prosecution." *Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

8 *Compare* 47 U.S.C. ¶ 231(c) ("It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors– (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;") *with ACLU I*, 521 U.S. at 861 (quoting CDA) ("It is a defense to prosecution under . . . this section that a person – . . . (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."). The only other affirmative defense in the CDA was a good faith, reasonable action defense similar to the third defense in COPA.

of the credit card defense, the government has now essentially abandoned its prior reliance on it. In its brief to this Court, it relies almost entirely on the adult access code defense. That defense, however, suffers from the same defects as the credit card defense.

The evidence clearly establishes that either defense would require users to register and provide a credit card or other proof of identity before gaining access to restricted content. These defenses burden free speech, for at least five reasons discussed below:

- they deny access to all adults without credit cards;
- they require all interactive speech on the Web to be placed behind verification screens, even speech that is not "harmful to minors";
- they deter adults from accessing protected speech because they impose costs on content that would be free, eliminate privacy, and stigmatize content;
- they allow hostile users to drive up costs to speakers; and
- they impose financial burdens on speakers that will cause them to self-censor rather than incur those burdens.

First, credit card verification would categorically prevent all adults without credit cards from accessing protected speech. 47 U.S.C. ¶ 231(c)(1)(A); *see also ACLU I*, 521 U.S. at 856 (citing district court's finding that a credit card requirement "'would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material'"). Adult access services

generally require payment by credit card as well. *See* Pet. App. 76a, ¶ 51; J.A. 401 (Farmer Testimony).

Second, the mandatory use of credit cards or adult access codes would burden interactive speech on the Web that is not even targeted by the statute. The government's own expert testified that "the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora." Pet. App. 79a, ¶ 58. Web-based interactive fora are inherently dynamic; for instance, PlanetOut's gay and lesbian users post messages that often include sexual content, and talk on Salon's discussion boards ranges daily from the racy to the mundane. Pet. App. 66a, ¶ 26; J.A. 361 (Talbot Testimony); *see also* Stmt. of the Case *supra* at 3-4. Yet COPA would impose screening requirements on *all* content in these interactive fora. As the district court found:

> the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, *even that which is not harmful to minors*, or editing all content before it is posted to exclude material that is harmful to minors. This has the effect of burdening speech in these fora that is not covered by the statute.

Pet. App. 90a (citation omitted and emphasis added). Plaintiffs' expert testified that these interactive fora are vital in attracting users to their Web sites. *See* J.A. 221 (Hoffman Testimony).

Third, as the district court found, "the implementation of credit card or adult verification screens in

front of material that is harmful to minors may deter [adult] users from accessing such materials." Pet. App. 89a. *See also* Pet. App. 65a-67a, ¶¶ 25-26, 89a; *ACLU I*, 521 U.S. at 857 n.23. Web users are reluctant to register and provide personal information. *See* Pet. App. 70a, ¶ 36. Because most content can be accessed anonymously for free, users "will only reveal credit card information at the time they want to purchase a product or service." Pet. App. 63a, ¶ 23, 70a, ¶ 36; *see also* Stmt. of the Case, *supra* at 8. Web sites that have required registration or payment before granting access "have not been successful." Pet. App. 70a, ¶ 36. Plaintiffs testified that any mandatory registration would drive away their users. *See* J.A. 330-31 (Barr Testimony), 344 (Tepper Testimony), 367-68, 370 (Reilly Testimony). In *ACLU I* this Court relied on similar findings that credit card and adult access code requirements would unconstitutionally inhibit adult Web users. *See ACLU I*, 521 U.S. at 857 n.23 ("'There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.'" (quoting district court)).

Mandatory use of credit cards or adult access codes would also deter users who want to preserve the privacy and anonymity inherent on the Web. If Web speakers utilize either COPA's adult access code or credit card defenses, Web readers would be required to provide sensitive identifying information, perhaps to an untrusted third-party Web site, before accessing protected speech. *See* J.A. 379 (Farmer Testimony). COPA would deter adults from accessing restricted content because Web users are simply unwilling to provide identifying information in order to gain access to content. *See* Pet. App. 89a-90a; J.A. 330-31 (Barr Testimony), 344 (Tepper Testimony), 367-68, 370 (Reilly Testimony) (customers would simply forego accessing plaintiffs' material entirely if forced to apply for

an adult access code, provide a credit card number, or pay for content). For example, Dr. Tepper testified that persons who access the Sexual Health Network "have already been too embarrassed or ashamed to ask even their doctor. I think if they come across this barrier to access, that they are just not going to take the next step and put their name and credit card information in." J.A. 344 (Tepper Testimony). In *Denver Area*, this Court struck down a similar identification requirement because it would "further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." 518 U.S. at 754.

The mandatory use of credit cards or adult access codes may also impose inhibiting financial costs on users. Contrary to its assertion, the government did not prove that credit card verification was feasible. Indeed, the district court found that "it was not clear from the conflicting testimony" whether credit card verification services will authorize or verify a credit card number in the absence of a financial transaction. Pet. App. 73a, ¶ 45. Without such a service, a Web speaker would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129 (Laurila Testimony). In the context of the Web where the vast majority of speech is provided for free, *ACLU I*, 521 U.S. at 852; *see also* J.A. 220, any financial burden on users would further deter them from accessing protected speech. Pet. App. 66a, ¶ 26. *See also* Stmt. of the Case, *supra* at 8; J.A. 133-135, 138 (Laurila Testimony), 156 (Talbot Testimony).

Fourth, the use of a credit card may also require the Web speaker to pay a per-user fee. Thus, even if credit card companies agree to verify credit cards without charging the user a fee, the credit card company would charge the Web speaker $0.15 to $0.25 per authorization. *See* Pet. App. 73a,

¶ 45. Such per-authorization fees would allow users offended by certain content to drive up costs to the Web speaker by repeatedly accessing restricted content. *See* J.A. 133 (Laurila Testimony).

Fifth, although the district court correctly held that the "relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs," Pet. App. 88a, the court found that COPA's economic pressures would burden speech. COPA's credit card and adult access defenses would require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that this could be prohibitively expensive, and, in some cases, would require plaintiffs to shield even some materials not "harmful to minors" behind age verification screens. As the district court recognized, the technological requirements for implementing either defense could be substantial—depending on the amount of content on a Web site, the amount of content that may be "harmful to minors," the degree to which a Web site is organized into files and directories, the degree to which "harmful to minors" material is currently segregated into a particular file or directory and the level of expertise of the Web site operator. *See* Pet. App. 71a, ¶ 39, 78a, ¶ 56. COPA would require some Web sites to reorganize and redesign literally thousands of files. *See* J.A. 158-59 (Talbot Testimony). A content provider also would have to reorganize individual files and pages in order to restrict only content that could be "harmful to minors." *See* Pet. App. 77a, ¶ 54. In addition, even a single page of Web content could have some content prohibited under COPA and some that was not, making it difficult if not impossible to segregate such content. *See Id.* 77a-78a, ¶ 55. Moreover, content providers using COPA's credit card defense "would need to undertake several

steps," *Id.* 72a, ¶ 41, with start-up costs ranging from "approximately $300 . . . to thousands of dollars. . . ." *Id.* 72a, ¶ 42.

Web speakers are faced with two strong incentives to self-censor: financial burdens and the risk of criminal penalties. Because registration requirements would deter readers and thereby decrease advertising revenue, many Web sites would choose to self-censor rather than attempt to implement a burdensome registration scheme. J.A. 256 (Hoffman Testimony). As David Talbot, CEO of Salon Magazine, explained,

> One of our competitors, *Slate Magazine*, which is owned and operated by Microsoft, launched originally as a free site like Salon did, but about a year ago decided to go to a [subscription] model with disastrous results for their circulation. Their circulation plummeted overnight from . . . over 150,000 individual users each month to about 20 to 30,000 . . . . That wouldn't be enough circulation to sustain *Salon's* business because advertisers expect you to have a certain circulation level before they'll do business with you. And, that typically is at least over 100,000 per month.

J.A. 144 (Talbot Testimony). *See also* J.A. 330-31 (Barr Testimony) (CNET would choose to self-censor rather than impose registration scheme); J.A. 225-27 (Hoffman Testimony) (study found consumers will not register at Web sites); J.A. 343-44 (Tepper Testimony) (Sexual Health Network believes its traffic will stop and its Web site will cease to have value if barriers to access are put in place).

Similarly, in striking down the CDA this Court found that "[t]here is concern by commercial content providers that age verification requirements would decrease

advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited." *ACLU I*, 521 U.S. at 857 n.23. The district court here thus correctly concluded that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 89a.

This Court has routinely struck down such economic burdens on the exercise of protected speech. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Erznoznik*, 422 U.S. at 217 (invalidating a statute that in effect required drive-in theater owners wishing to avoid prosecution either to restrict their movie offerings or construct expensive protective fencing).

Relying heavily on the adult access code defense, the government's brief overlooks all the evidence in the record that adult access codes burden speech. Adult access codes impose the burdens discussed above, and indeed are more likely to deter users in some circumstances. For example, users are reluctant to use adult access codes because they are associated with the pornography industry. Plaintiffs testified that their users would forego accessing their content rather than apply for adult access codes. J.A. 137-38 (Laurila Testimony); *see also* Stmt. of the Case, *supra* at 10-11; *Denver Area*, 518 U.S. at 754 (discussing fear of social stigma if persons are required to affirmatively request "patently offensive" materials). Adult access codes also impose monthly or yearly fees upon all users, even those who want to view only one Web site on one occasion. *See*

Pet. App. 76a, ¶¶ 51-53; *see also Denver Area*, 518 U.S. at 754 (noting restrictive effect of requirement that would not allow a user to select one "patently offensive" program to view).

C. COPA Is Not Narrowly Tailored To Advance The Government's Asserted Interest

COPA also fails strict scrutiny because it would not even advance the government's asserted interest. Even if the government has a compelling interest in protecting some minors from material that may be harmful, which it did not prove,[9] COPA is far from narrowly tailored to achieve that goal.[10] Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). COPA fails this test. COPA does not restrict the wide range of "harmful to minors" materials provided non-commercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *See* Pet. App. 93a. In addition, at least forty percent of Web content originates abroad, and COPA has no effect on this foreign Web content. *See id.* 62a, ¶ 20, 93a. These flaws "demonstrate[] the problems this statute has with efficaciously meeting its goal." *Id.* 93a.[11]

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9 *See* Amicus Curiae Brief on Behalf of Society for the Scientific Study of Sexuality, et al.

10 The government offered no evidence to support its new assertion that "[p]ornography is harmful to children because it does not provide them with a normal sexual perspective." Gov. Br. at 3.

11 In fact, former Attorney General Janet Reno herself recognized this defect. In a letter sent to Congress before COPA passed, the Attorney General stated:

> Such a diversion [of law enforcement resources] would be particularly ill-advised in light of the uncertainty concerning whether the COPA would have a material effect in limiting minors' access to harmful materials. There are thousands of newsgroups and Internet relay chat channels on which anyone can access pornography; and children would still be able to obtain ready access to pornography from a myriad of overseas web sites.

Letter Dated October 5, 1998 from Department of Justice to Honorable Thomas Bliley, Chairman of House Committee on Commerce (Pls. Mem. of Law in Support of TRO, Ex. A) at 3.

In contrast, the district court identified effective and less restrictive alternatives to COPA's criminal penalties. *See* Pet. App. 93a-95a. The government's expert conceded that, unlike COPA, parental use of blocking software can prevent access to foreign sites, content on non-Web-based protocols, and material from non-commercial Web sites. *See* Pet. App. 81a-82a, ¶ 65, 94a. As the district court held, "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. App. 94a. Although user-based blocking programs are not perfect, both because they fail to screen some inappropriate material and because they block some valuable Web sites, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than COPA's imposition of criminal penalties for protected speech among adults. *See* Pet. App. 94a-95a; *see also ACLU I*, 521 U.S. at 879.

Congress itself has recognized the usefulness of user-based blocking software through another provision enacted along with COPA, and not challenged here, that

requires Internet service providers to "notify [all new customers] that parental control protections (such as computer hardware, software or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d). Congress also established a Commission on Online Child Protection, when it enacted COPA, to study methods of reducing minors' access to harmful materials. 112 Stat. 2681-736. That Commission ultimately concluded that user-based alternatives were more effective and less restrictive than COPA. Comm. on Child Protection Report to Congress (Oct. 20, 2000), *available at* http://www.copacommission.org/report/COPAreport.pdf.

The government wrongly argues that the court of appeals' holding is flawed because it did not rely on the less restrictive alternatives to COPA identified by the district court. *See, e.g.*, Gov. Br. at 12-13. First, the court of appeals clearly affirmed the findings of the district court regarding the availability and effectiveness of user-based blocking software.[12] *See* Pet. App. 11a-13a. Second, though the court of appeals opined in dicta that voluntary alternatives could not constitute less restrictive alternatives because they were not government action, the court of appeals itself acknowledged that this Court had ruled to the contrary. *See* Pet. App. 15a n.16 (citing *Playboy*).

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12 The district court had also noted that the government could draft a narrower statute. *See* Pet. App. 94a-95a. Even if there were no less restrictive alternatives, though, it is clear that the government "may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988).

This Court has specifically relied on the ability of parents to block objectionable content as "less restrictive than [government] banning." *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was a less restrictive alternative than forcing operators to scramble channels as a default); *see also ACLU I*, 521 U.S. at 876-77 (finding that less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes and citing to the district court's findings that parents can prevent their children from accessing material); *Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television).

Thus, both Congress and this Court have acknowledged that parents can voluntarily block objectionable content, which supports the district court's finding that there are effective and less restrictive alternatives to COPA's ban on constitutionally-protected speech.

II. COPA UNCONSTITUTIONALLY IMPOSES THE MOST RESTRICTIVE COMMUNITY'S STANDARDS ON WEB SPEECH NATIONWIDE[13]

A. The Court Of Appeal's Reasoning Is Correct Under *Miller* And Its Progeny

Relying on the clear rulings of this Court, the court of appeals correctly held that COPA is unconstitutionally overbroad because it subjects Web speakers across the

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13 Despite the government's assertion to the contrary, *see* Gov. Br. at 12, the "community standards" problem was not raised for the first time by the court of appeals. *See* J.A. 47, ¶ 26, 63, ¶83, 64, ¶85, 102, ¶200 (Complaint).

nation to the most restrictive community's standards for what is "harmful to minors." As the record shows, Web speakers have no way to determine the characteristics of their audience—whether age or geographic location. *See* Stmt. of the Case, *supra* at 7. Just as the inability under COPA to verify age on the Web transforms a standard aimed at minors into one that censors adults, the inability to verify the geographic location of Web users transforms COPA's "community standards" requirement into a national mandate of the most restrictive community's standards. The government does not attempt to challenge the long-standing doctrine prohibiting a national standard,[14] or the factual findings that inevitably led the court of appeals to conclude that COPA violates that doctrine. Rather, the government tries to limit the unconstitutional impact of community standards on the Web by relying on facts contradicted by the actual record and on a myopic view of the relevant case law. A brief historical review of the standard should inform the Court's analysis.

The "community standards" doctrine was first applied to state obscenity laws. In *Roth v. United States*, 354 U.S. 476, 489 (1957), this Court defined the obscenity test as whether "the average person, applying contemporary community standards, [finds that] the dominant theme of the material taken as a whole appeals to prurient interest." Following *Roth*, the justices disagreed about whether "community standards" should be local or

14 The broadcast medium is the *only* medium in which this Court has upheld a national standard for "patently offensive" content, defined by a federal administrative agency. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Here, COPA requires juries around the country, not a single federal agency, to determine what is "patently offensive." This Court specifically rejected the government's attempt to treat the Internet like broadcast. *ACLU I*, 521 U.S. at 866-67.

national. *See A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting). The Court resolved the debate in *Miller v. California*, 413 U.S. 15 (1973), and articulated the local community standards doctrine that has governed for almost 30 years. *See id.* at 30-31.[15] In defining the permissible scope of speech regulation, this Court specifically adopted a *local* community standards test, noting that a national standard would not be "constitutionally sound." *Id.* at 32. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation." *Id.* at 30.

Shortly before *Miller*, this Court issued its only opinion to date regarding the constitutionality of a state statute that made it a crime to sell material directly to minors that was obscene as to minors, but not as to adults. *Ginsberg v. New York*, 390 U.S. 629 (1968). In lower court cases following *Ginsberg*, such statutes became known as variable obscenity or harmful-to-minors statutes. After the Court's articulation of the new obscenity test in *Miller*, state harmful-to-minors statutes were amended or interpreted to apply a local community standards test. *See*,

15 The *Miller* test is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

e.g., *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988).

B. The Facts Establish That COPA Unconstitutionally Imposes The Most Restrictive Community Standards On All Web Speech

The language denoting local community standards in COPA is modeled on *Ginsberg* and *Miller*. COPA criminalizes "prurient" material as judged by "the average person, applying *contemporary community standards*." *Miller*, 413 U.S. at 24 (citations omitted) (emphasis added). The impact of this standard on the Web is fundamentally different than its impact on other media. The government itself *stipulated* at the preliminary injunction hearing that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community." *See* J.A. 187, ¶ 41 (Joint Stipulations for the Preliminary Hearing); Pet. App. 62a, ¶ 18. The government saw no reason to re-litigate this quintessential feature of the Internet, which was clearly established in *ACLU I*, 521 U.S. at 853 (quoting district court). Unsurprisingly, it chose not to challenge the finding on appeal. Pet. App. 12a. Especially on appeal from a preliminary injunction, the government cannot now try to negate its stipulation and the district court findings by relying on unsupported facts not in the record. *See* Gov. Br. at 29 n.3.[16]

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16 The government cites two articles and the decision of a French trial court, *see* Gov. Br. at 29 n.3, but ignores all of the American courts that, after evidentiary hearings, have specifically found that online speakers cannot determine the geographic location of their readers. *See infra* at 39. In addition, the experts on which the French court relied have largely repudiated that court's conclusion. *See* Complaint For Declaratory Relief, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Anti-Sémitisme* (N.D. Cal. Dec. 21, 2000) *available at* http://www.cdt.org/speech/international/0011221yahoo complaint.pdf, ¶¶ 22-24, 26-28, 31. Finally, the French court relied, in part, on the fact that most French Internet users have e-mail addresses that contain the designation ".fr," indicating that their account is based in France. *See* Interim Court Order, *La Ligue Contre Le Racisme Et L'Anti-Sémitisme v. Yahoo! Inc.* (T.G.I. Paris Nov. 20, 2000) English translation *available at* http://www.istf.org/archive/yahoo_france.html. No similar designation is given to distinguish users from specific U.S. states.

Because Web speakers are without any means to limit access to their sites based on the geographic location of particular users, they must conform to the standards of the most conservative community or risk criminal prosecution when their speech is accessed in those communities. Plaintiffs testified that they had no way to prevent their material, which they believe is valuable, from reaching communities that might find it harmful to minors. *See, e.g.*, J.A. 110 (Laurila Testimony) ("we have no knowledge of who you are or where you're coming from or anything else"). In addition, the district court found that the burdens of segregating Web content could be substantial. Pet. App. 71a, ¶ 39, 78a, ¶ 56. If speakers were required to create and segregate different versions of content in order to conform to the varying standards of a multitude of communities throughout the United States, these burdens would increase exponentially. *See* Stmt. of the Case, *supra* at 10-11.

Based on the government's own stipulation and the testimony at the hearing, the Third Circuit thus correctly held that COPA must be enjoined because speakers could be jailed for providing content that is constitutionally protected in many communities:

> [T]o avoid liability under COPA, affected Web publishers would either need to severely censor

> their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

Pet. App. 24a-25a; *see also id.* 29a.

The Third Circuit relied directly on *ACLU I*, in which this Court also found that Web speakers are unable to prevent their speech from reaching a particular geographic community. 521 U.S. at 853. Practically, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing." *Id.* at 854 (quoting district court). The Court recognized in *ACLU I* that the CDA's use of community standards contributed to the statute's overbreadth, stating that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78.

A number of other courts have also found that the inability to know the location of Web users causes

constitutional problems in statutes that restrict online speech. As the court in *American Library Ass'n v. Pataki* explained,

> The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have "addresses," they are logical addresses on the network rather than geographic addresses in real space.

969 F. Supp. 160, 170 (S.D.N.Y. 1997). In *ACLU v. Johnson*, the Tenth Circuit similarly found that "'geography . . . is a virtually meaningless concept on the Internet.'" 194 F.3d 1149, 1161 (10th Cir. 1999) (quoting *Pataki*, 969 F. Supp. at 166-67, 171, in striking down online harmful-to-minors law as violation of First Amendment and dormant Commerce Clause); *see also Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 741 (E.D. Mich. 1999) ("virtually all Internet speech is . . . available everywhere."), *aff'd*, No. 99-2064, 2000 WL 1769592 (6th Cir. Nov. 15, 2000); *PSINet v. Chapman*, 108 F. Supp. 2d 611, 616 (W.D. Va. 2000) ("There is no practical way for an Internet speaker to prevent a message from reaching residents of his own or any particular state."). As a number of courts have now held, online speakers simply have no way to conform their speech to the standards of all geographic communities. "As the poet said, 'I shot an arrow into the air; it fell to the earth I know not where.'" *Pataki*, 969 F. Supp. at 167.

C. The Government Presented No Evidence That Community Standards Are "Reasonably Constant" Across America, And Such An Interpretation Would Not Save The Statute

Even Congress realized that "the applicability of community standards in the context of the Web is controversial." H.R. Rep. No. 105-775, at 27 (1998). In an attempt to sidestep this defect, the government relies on a purported Congressional finding to argue that the "harmful to minors" standard is "reasonably constant" across the United States.[17] *See* Gov. Br. at 36-38. But no semantic trick will cure the overbreadth caused by imposing local community standards on the borderless medium of the Web. The government cannot argue for a national standard of what is harmful to minors without violating this Court's teaching in *Miller*. To the extent its "reasonably constant" argument does *not* argue for a national standard, the government concedes that COPA would unquestionably prevent adults from accessing speech that they have a constitutional right to receive. Gov. Br. at 41. The evidence shows that COPA affects millions of Web pages and interactive messages. Pet. App. 55a-56a, ¶¶ 1-2. Contrary to the government's argument, then, requiring the vast amount of potentially harmful-to-minors speech on the Web to conform to different standards would impose a tremendous burden even if there is only *some* variation

17 The government also argues that COPA's community standards are not meant to be geographic, but rather the standards of the adult community as a whole, "without geographic specification." *See* Gov. Br. at 28 n.2. Especially if juries are instructed to consider the Web "a national medium," *see* Gov. Br. at 38-39, this interpretation also essentially imposes a national standard in violation of *Miller*.

between communities. Thus, the preliminary injunction must be affirmed because COPA burdens a significant amount of protected speech even if standards are assumed to be "reasonably constant." But as the court of appeals correctly noted, "we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors." Pet. App. 31a. Indeed, the government put on *no* evidence at trial to suggest that standards were constant.[18]

The record and the government's own position in this case illustrate that COPA would subject plaintiffs and other speakers to widely different community standards across the country. The government itself has been inconsistent in its interpretation of what speech meets the standard. The government explicitly assured the district court on at least two separate occasions that plaintiffs' materials are not harmful to minors.[19] However, despite these assertions, the government now suggests that "[s]ome of respondents' exhibits . . . plainly do test, and likely exceed, the legal limitations imposed by th[e] three prongs" of the harmful-to-minors test. *See* Gov. Br. at 37. In contrast, Members of Congress who sponsored COPA have filed an amicus brief asserting that *all* of the plaintiffs'

18 The government also argues that the serious value prong (which is a national standard) creates a national floor, Gov. Br. at 34-35, and that "the legal limitations on what can be found to satisfy the first two prongs of the harmful-to-minors standard can be enforced by a reviewing court," Gov. Br. at 36. But these arguments applied in *Miller* and its progeny as well, and the Court nonetheless held that a nationwide standard for all three prongs would be defective.

19 *See* Closing Statement of Senior Trial Counsel Karen Stewart, January 26, 1999 at 253 ("plaintiffs' materials are not harmful to minors"); Testimony of Trial Attorney Rupa Bhattacharyya, January 27, 1999 at 39 ("defendant feels that the plaintiffs' materials are not harmful to minors").

speech is protected. Brief of Amici Curiae Members of Congress, Senator John S. McCain et al. at 19. It is difficult to imagine how community standards can be "reasonably constant" across America when they are not even constant between the sponsors of COPA and the small group of lawyers defending it.

The plaintiffs also testified that while they believe their speech is valuable, some communities might find it harmful to minors. For example, Ernest Johnson of Artnet.com testified that Jock Sturges photographs were available on his site, but that Sturges photographs had been targeted as obscene in Alabama and Tennessee. S.L. 14 (Johnson Decl.). Tom Reilly of PlanetOut testified that in his experience small town community standards regarding discussions of sexual orientation were different than the standards of his lesbian and gay readers. J.A. 356-58 (Reilly Testimony).

Other indicators make it clear that communities disagree about what material is appropriate for minors – just as they did when this Court first adopted local community standards in *Miller*. First, the state harmful-to-minors laws themselves–on which COPA was modeled–are not uniform in what material they proscribe. Some prohibit mere nudity if it is "patently offensive," while others prohibit only specifically defined sexual content. *Compare* D.C. Code Ann. § 22-2201(b) (WESTLAW 2000); Idaho Code §§ 18-1514, 1515 (WESTLAW 2000), *with* La. Rev. Stat. § 14:91.11. (WESTLAW 2000). Some prohibit mere display of harmful materials, while others prohibit only the direct sale of materials to others. *Compare* Ala. Code § 13A-12-200.5(2)(a) (WESTLAW 2001) *with* N.Y. Penal Law § 235.21.1 (McKinney 1999). At least one state has recently upheld a conviction for exposing a child to a photograph of "a woman with shirt and jacket open to the waist, without exposing her nipples," *State v. Stankus*, No. 95-2159-CR,

1997 WL 58727, at *1 (Wisc. App. Feb. 13, 1997); other states only prohibit fully-exposed breasts, S.C. Code Ann. § 6-15-375, as amended (WESTLAW 2000).

Several recent surveys also show that communities around the country have decidedly different views about what may be harmful to minors. For example, one survey establishes that more than 20% of school districts in the northeast have comprehensive sex education programs (as compared to abstinence-only programs), while only 5% of school districts in the south provide comprehensive programs.[20] Attitudes also differ widely about whether it is harmful to expose children to homosexuality. While some school districts actively promote "gay/straight alliance" clubs, others have completely eliminated all extracurricular clubs just to prevent such clubs from forming. *See, e.g., Judge: It's Legal to Ban School Clubs, But East High Gay Group Can Sue*, Salt Lake Tribune, Oct. 8, 1999 at 1 (community bans all extracurricular clubs in order to prevent gay/straight alliance). In addition, polls show that 52% of people in the south believe that homosexuals should not be hired as elementary school teachers, while only 30% of people in the east hold that belief. *See* Gallup Poll, Feb. 22, 1999, *available at* LEXIS News Library, RPOLL File, Accession No. 0322043. Similarly, 66% of people in the south believe that homosexual couples should not be permitted to adopt children, compared to only 46% of easterners. *See* Yankelovich Partners Poll, Oct. 16, 1998, *available at*

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20 *See* Alan Guttmacher Institute, *Sex Education: Politicians, Parents, Teachers and Teens, available at* http://www.agi-usa.org/pubs/journals/gr040109.html (2001); *see also* Centers for Disease Control, *Surveillance for Characteristics of Health Education Among Secondary Schools – School Education Profiles* (1998) (finding that schools differ regarding whether they teach how HIV is transmitted or how to use condoms).

LEXIS News Library, RPOLL File, Accession No. 0312302. Moreover, each year the American Library Association documents community-based attempts to ban books such as *The Catcher in the Rye*, by J.D. Salinger, and the *Harry Potter* books, by J.K. Rowling–books that are considered mainstream and required reading in other communities. *See The 100 Most Frequently Challenged Books of 1990-1999*, *available at* http://www.ala.org/bbooks/top100bannedbooks1999.html. All of these attempts, whether or not they rely on legal prohibitions, are based on presumed harm to minors. Thus, they all illustrate that attitudes about what is appropriate or harmful for minors are very far from "reasonably constant across America."[21]

D. The Court of Appeals' Reasoning Is Fully Consistent With *Hamling* and *Sable*

The government argues that subjecting the same speaker to varying standards is not unusual or unconstitutional, citing *Hamling v. United States*, 418 U.S. 87 (1974), and *Sable*, 492 U.S. 115. *See* Gov. Br. at 14, 17, 31-33. As the court of appeals held, however, those cases are "easily distinguishable from the present case." Pet. App. 26a. *Sable* and *Hamling* involved the regulation of the actual sale of pornography by phone and through the mail, respectively. In both instances, the services were provided only to paid subscribers, and providers could simply refuse to send the material to subscribers living in more conservative geographic communities. Unlike Web speakers, then, the phone and mail providers in those cases could control the distribution of controversial material in particular geographic communities. *See* Pet. App. 26a; *see also Sable*, 492 U.S. at 125-26; *Hamling*, 418 U.S. at 106.

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21 *See also* Amicus Curiae Brief on Behalf of Volunteer Lawyers for the Arts and People for the American Way.

In addition, the speech affected by COPA is quite different than the speech affected by the phone and mail service restrictions. The number and range of providers is astronomically greater, and includes valuable information about sexual dysfunction, gay and lesbian resources, and art that may nevertheless be harmful to minors in some communities. *See* Pet. App. 52a-53a, 63a, ¶ 21. The vast majority of the content is provided free of charge. The chilling effect of requiring speakers to abide by the standards of every community would thus be even greater when applied to the Web. In stark contrast to the discreet industries at issue in *Hamling* and *Sable*, the low barriers to access on the Web provide a nationwide forum to a vast range of speakers who cannot afford legal counsel, who have no industry guidelines to follow, and whose Web content is not their primary business. *See ACLU I*, 521 U.S. at 870. When faced with the threat of criminal penalties, these speakers would almost certainly err on the side of eliminating content if there were even the slightest chance that it could be considered "harmful" in conservative communities.

This Court has recognized that each medium of expression is unique, and "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *see also Playboy*, 529 U.S. at 813. In contrast to speakers using other media, Web speakers cannot restrict access to their speech based on the geographic location of their users. *See* Pet. App. 26a. "'[A]n Internet user cannot foreclose access to ... work from certain states or send differing versions of ... communication[s] to different jurisdictions.... The Internet user has no ability to bypass any particular state.'" Pet. App. 26a-27a (citing *Pataki*, 969 F. Supp. at 183). Given the unique features of the Web, COPA forces Web speakers to either comply with the most

stringent standard or "'[entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution.'" Pet. App. 27a (citing *Pataki*, 969 F. Supp. at 183) (alterations in original).

Clearly unable to meet its actual burden of proving that COPA meets the strictest constitutional scrutiny, the government warns that affirming the Third Circuit's reasoning would render state harmful-to-minors laws "largely meaningless." *See* Gov. Br. at 25. But the government distorts the current state of the law. According to the Government's own tally, only half of the states even have harmful-to-minors laws that prohibit the display—rather than the direct sale—of such materials to minors. *See* Gov. Br., App. II. This Court has never upheld the constitutionality of these laws,[22] and some courts have recognized constitutional problems with their application even to the print medium.[23] To the extent these laws are valid in the print medium, COPA does nothing to prevent their application. In addition, any interest that Alabama, for example, has in its harmful-to-minors display law does not justify imposing COPA's prohibitions on each of the majority of states that has specifically rejected even a print display statute. Indeed, because of the unique qualities of the online medium, courts have uniformly rejected the application of state harmful-to-minors statutes to the

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22 The closest the Court came to deciding the constitutionality of such a statute was *Virginia v. American Booksellers*, in which it stated that the law could present "substantial constitutional questions" depending on its impact on adult speech. 484 U.S. 383, 394 (1988).

23 *See, e.g., Webb*, 919 F.2d at 1504-05, 1508-09; *American Booksellers Ass'n v. Rendell*, 481 A.2d 919, 938-39 (Pa. 1984); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Virginia v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (Va. 1988).

Internet; the government conveniently ignores these cases.[24] *See Cyberspace Communications v. Engler*, No. 9902064, 2000 WL 1769592 (6th Cir. Nov. 15, 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *Pataki*, 969 F. Supp. at 169.

Far from maintaining the status quo, COPA would impose a radical new federal censorship regime. Never before has there been a federal criminal harmful-to-minors law for any medium–COPA is the first. As the Court said in *ACLU I*,

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

521 U.S. at 885. This Court should thus affirm the Third Circuit's ruling that local community standards, while workable in narrow circumstances for other media, unconstitutionally restrict adults from communicating and accessing protected speech on the Web.

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24 Suggesting a narrower way to protect minors, courts have held that statutes which prohibit the use of harmful-to-minors materials for the purpose of soliciting minors can be constitutionally applied to the Internet. *See, e.g., People v. Barrows*, 677 N.Y.S.2d 672 (Sup. Ct. 1998), *rev'd in part on other grounds*, 709 N.Y.S.2d 573 (App. Div. 2000); *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453 (Cal. App. 2000).

CONCLUSION

For the reasons stated above, plaintiffs respectfully ask this Court to affirm the preliminary injunction against the Child Online Protection Act.

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RECD TEAM 11
NOV 14 2001
(19)
Supreme Court, U.S.
FILED
OCT 24 2001
CLERK
No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Child Online Protection Act (COPA), 47 U.S.C. 231(a)(1) and (c)(1) (Supp. V 1999), requires Web businesses that regularly make profit-motivated harmful-to-minors communications to place such material behind age verification screens. COPA parallels state display laws that require local stores to place pornographic material that is harmful to minors behind blinder racks, in sealed wrappers, in opaque covers, or behind the counter. Courts of appeals and state courts have consistently upheld state display laws on the ground that they further the government's compelling interest in shielding minors from material that would impair their psychological and moral development, without imposing an unreasonable burden on adults who seek access to such material. COPA is constitutional for the same reason. Indeed, COPA's principal effect is merely to require commercial pornographers who already place much of their material behind age verification screens to place their pornographic teasers behind those screens as well.

The court of appeals' judgment invalidating COPA rests entirely on its determination that COPA's reliance on "community standards" violates the First Amendment. In fact,

however, COPA's reliance on the standards of the adult community as a whole serves as a valuable First Amendment safeguard: It helps to ensure that jurors will assess material based on the judgment of an average person, rather than on the personal reactions of an individual juror or a particularly sensitive person.

Respondents nonetheless argue (Br. 33-47) that COPA's reliance on community standards violates the First Amendment. They also argue (Br. 15-33) that COPA fails strict scrutiny. Both contentions are without merit.

I. COPA'S RELIANCE ON COMMUNITY STANDARDS DOES NOT VIOLATE THE FIRST AMENDMENT

A. COPA Constitutionally Adopts The Standards Of The Adult Community With Respect To What Is Harmful To Minors

Respondents contend (Br. 36-39) that because Web content cannot be limited to particular geographic areas, COPA effectively requires Web businesses to comply with the standards of the country's least tolerant locality. As a result, respondents argue, COPA requires Web businesses to place behind age verification screens material that is not harmful to minors in many communities. In fact, Web content can be limited to particular geographic areas, albeit at some cost.[1]

[1] Web businesses can limit their material to particular geographic areas by limiting access to members and mailing membership cards to specific geographic areas. A new technology also permits a Web business to identify a Web visitor's geographic identity. Gov't Br. 29 n.3. Contrary to respondents' contention (Br. 36), the government did not stipulate otherwise. The government stipulated only that "[o]nce a provider posts its content on the Internet *and chooses to make it available to all*, it generally cannot prevent that content from entering any geographic community." 1 C.A. App. 187 (emphasis added). Through the methods discussed above, a Web business can "choose" not to "make" its content "available to all." Respondents correctly point out that those methods for geographic screening are not in the record, but they do not dispute their availability.

Even accepting, arguendo, respondent's factual premise, COPA's reliance on community standards is constitutional.

1. Contrary to respondents' assertion (see *e.g.*, Br. 35, 40), COPA does not call for the application of "local community standards." Nor does COPA require the trier of fact to ascertain and apply the standards of the State in which a particular locality is situated. Cf. *Miller* v. *California*, 413 U.S. 15 (1973) (upholding California law providing for statewide standards). Instead, COPA requires jurors to assess material based on the community standards of the adult population as a whole with respect to what is harmful to minors, without a particular geographic specification. H. R. Rep. No. 775, 105th Cong., 2d Sess. (H. Rep. 775) 28 (1998). Under that approach, "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974). A juror is not directed, however, to apply the standards of any "precise geographic area." *Id.* at 105.

Thus, under COPA, "community standards" is intended to refer not to the standards of a particular locality, but rather to emphasize that whether material appeals to the prurient interest and is patently offensive with respect to minors is to be judged from the perspective of adults in society at large, rather than particularly sensitive (or insensitive) adults. In *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974), the Court held that such an instruction complies with the First Amendment. The Court explained that "[a] State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller*, without further specification, as was done here, or it may choose to define the standards in

more precise geographic terms, as was done by California in *Miller*." *Ibid.* Because the application of COPA does not turn on local standards, there is no basis for holding COPA unconstitutional on its face because of a supposed variation in local standards.

2. Even though COPA does not adopt or focus the jury on the standards of a particular locality, it remains possible that different juries might reach different conclusions and that the situs of the jury (like other variables) could contribute to that result. But "[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Miller*, 413 U.S. at 26 n.9.

There are, moreover, additional reasons in the present context to reject respondents' challenge based on speculation about the possibility of variation in local standards. First, Congress determined when it enacted COPA that community standards concerning what is "prurient" and "patently offensive" with respect to minors are likely to be "reasonably constant" throughout the United States. H. Rep. 775, at 25. See pp. 7-9, *infra* (discussing that determination in greater detail). Second, juries should be instructed to take into account the fact that the Web is a nationwide medium (see Gov't Br. 39), which should guard against the possibility that a particular jury might take too parochial a view of what is harmful to minors.

Respondents contend (Br. 40 n.17) that COPA's adoption of a standard drawn from the adult community as a whole without geographic specification—when coupled with an instruction that the jury take into account that the Web is a nationwide medium—in effect creates a "national standard," which respondents assert is prohibited by *Miller*. See Br. 34-35. That contention is erroneous for two reasons. First the *Miller* Court held that "[n]othing in the First Amendment *requires* that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." Br. 31-32 (emphasis added). *Miller* did not hold that the use of national standards would *violate* the First Amendment. See *Hamling*, 418 U.S. at 107-110 (affirming conviction based on jury determination applying national standard); *Smith* v. *United States*, 431 U.S. 291, 304 n.11 (1977) (reserving question whether Congress may mandate a national standard).

Second, COPA calls for the application of community standards without geographic specification, local *or* national. COPA therefore does not require a jury to evaluate material based on "hypothetical and unascertainable 'national standards.'" *Miller*, 413 U.S. at 31. The suggested jury instruction concerning the nature of the Web is not to the contrary; it simply instructs the jury, when evaluating material under the standards of the adult community with respect to what is harmful to minors, to take into account that the particular *medium* on which the material is displayed is national in scope.

3. To the extent that the situs of the jury might have some residual effect on the outcome in particular cases, that possibility does not render COPA facially unconstitutional. Web businesses that regularly display harmful material for profit take advantage of a nationwide market for their material. It is reasonable to require such businesses to make sure that their business activities do not harm minors in the areas of the country from which they seek to profit. Web businesses can easily satisfy that requirement by placing all harmful material behind an age verification screen.

COPA's regulation of obscenity on the Web illustrates the flaw in respondents' First Amendment theory. A Web business that makes harmful material available nationwide can reasonably be expected to consider the consequences of its action. A Web business may not justify displaying material that is obscene in one area of the country simply on the ground that it would not be found obscene in another. See

Reno v. *ACLU*, 521 U.S. 844, 883 (1997) (preserving application of the Communications Decency Act to obscene material on the Internet). Similarly, Web businesses do not have a First Amendment right to harm minors in some parts of the country simply because they are (by hypothesis) not harming minors in other parts.

This Court's decisions support the constitutionality of applying community standards to the Web. In *Hamling*, 418 U.S. at 106, the Court held that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Likewise, in *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 125-126 (1989), the Court held that "[t]here is no constitutional barrier * * * to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."

Respondents contend (Br. 44) that *Hamling* and *Sable* are distinguishable because "the phone and mail providers in those cases could control the distribution of controversial material in particular geographic communities." But Web businesses can also control the distribution of their material. See note 1, *supra*. More fundamentally, the holdings in *Hamling* and *Sable* did not depend on that factor. *Hamling* did not mention geographic control as an element in its analysis. Although *Sable* noted that Sable could control geographic distribution of its message at some cost, it held that, regardless of that factor, "Sable ultimately bears the burden of complying with the prohibition on obscene messages." 492 U.S. at 126. Respondents' effort to distinguish *Hamling* and *Sable* on factual grounds ignores the controlling legal analysis in those decisions. In any event, COPA does not call for the application of "local" standards as a legal matter, and there is no reason to anticipate significant geographic variation in the application of COPA as a practical matter. See pp., 7-9, *infra*.

Acceptance of respondents' view that community standards are unconstitutional as applied to the Web would also have an extraordinary consequence. As the court of appeals acknowledged, if Congress may not apply community standards to the Web, "there may be no other means by which harmful material on the Web may be constitutionally restricted." Pet. App. 3a. Thus, under respondent's First Amendment theory, even though Congress has a compelling interest in preventing harmful material from reaching minors, it may be powerless to adopt any effective measure to serve that compelling interest. We are not aware of any decision of this Court that has invalidated an Act of Congress that serves a compelling interest when there has been no effective alternative for furthering that interest.

B. Community Standards Concerning What Is Harmful To Minors Are Reasonably Constant Across The United States

Respondents contend (Br. 40-44) that there is no evidence supporting Congress's determination that the standards of the adult community concerning what is harmful to minors are reasonably constant in the country. Congress, however, reached a common-sense conclusion based on the kind of material that is subject to the requirements of the Act and the understanding of the American people possessed by its Members elected by the American people. Congress aimed COPA primarily at the conduct of commercial pornographers that display pornographic teasers to entice viewers to purchase other material on the site. H. Rep. 775, at 7, 10. Congress had ample reason to conclude that such material would be regarded as harmful to minors throughout the country. The government exhibits that are lodged with the Court (2 C.A. App. 758-812) vividly illustrate the nature of that material. Congress did not need to conduct empirical

studies in order to conclude that adults throughout the country would view such material as prurient and patently offensive with respect to minors. Respondents do not suggest that there are places in the country where a different conclusion would be reached.

Respondents instead argue (Br. 43-44) that communities have different attitudes about whether sex education, information on homosexuality, and books such as *The Catcher in the Rye* are suitable for minors. Communities may well differ on those issues. But COPA does not permit such differences to affect coverage under the statute. A crucial feature of COPA that respondents fail to address is that it expressly excludes from coverage material that, "taken as a whole," has "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(C) (Supp. V 1999). Under COPA, the question whether material has serious value does not depend on community standards. *Reno* v. *ACLU*, 521 U.S. at 873; *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987). Instead, the resolution of that issue depends on whether the material has serious value for a "legitimate minority" of older minors. *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988). For more than a decade, courts have enforced that legal limitation to exclude from state display laws books on sex education and controversial works such as *The Catcher in the Rye*. *Ibid.* (*The Facts Of Love* and *The New Our Bodies Ourselves* not covered by state display law despite graphic drawings of human anatomy and explicit yet informative discussions of sexual acts). Such material is similarly excluded as a matter of law from COPA. Thus, respondents' surveys do not undermine Congress's judgment that, with respect to the material to which COPA is addressed, community standards are "reasonably constant."

Respondents' reliance (Br. 42-43) on differences in state harmful-to-minors laws is also unpersuasive. As respondents note (Br. 42), some States prohibit only distribution of

material that is harmful to minors, while many others prohibit public display of such material as well. But that simply reflects a difference in enforcement strategies; it does not reflect any significant underlying difference in the category of material that communities throughout the country regard as prurient and patently offensive with respect to minors.

Respondents also note (Br. 42) that some States prohibit nudity that is patently offensive, while others prohibit specifically defined sexual content. Those definitions, however, may simply amount to different ways of describing the same basic content. In any event, as this Court has explained, the definitions of covered material in state law prohibitions are not necessarily embodiments of community standards; often they reflect only a State's enforcement priorities. *Smith*, 431 U.S. at 302-303, 306. The state law differences identified by respondents therefore do not affect the validity of Congress's judgment that community standards are reasonably constant throughout the Nation concerning what is prurient and patently offensive with respect to minors.

A review of respondents' sample exhibits (Br. 18-19) provides further support for Congress's judgment. Most of those exhibits are excluded from coverage as a matter of law by one or more of the three prongs of the harmful-to-minors standard. One of those exhibits contains photographs of abnormal sexual acts, 2 C.A. App. 710-713, and two others contain titillating and graphic first-person accounts of sexual experiences. *Id.* at 617-620, 745-748. If regularly displayed on the Web for profit, those exhibits would likely not be excluded from coverage as a matter of law. But there is no reason to believe that those exhibits would be viewed as appealing to prurient interest and patently offensive with respect to minors in some communities but not in others. Indeed, respondents' brief does not identify a single exhibit as to which coverage under COPA would depend on which community in the country evaluated the material.

II. RESPONDENTS' STRICT SCRUTINY ARGUMENTS ARE NOT RIPE FOR REVIEW

Respondents also contend (Br. 15-33) that COPA fails strict scrutiny. That issue is not ripe for review. The court of appeals based its judgment invalidating COPA entirely on its view that COPA's reliance on community standards violates the First Amendment. Pet. App. 21a. That court did not address whether COPA otherwise satisfies strict scrutiny. *Id.* at 21a n.19. The government's certiorari petition in this case similarly raised only the question whether COPA's reliance on community standards violates the First Amendment. Pet. I.

Unlike the court of appeals, the district court did address whether COPA satisfies strict scrutiny. But because proceedings in the district court were directed to respondents' request for a preliminary injunction, the court did so in a preliminary way. The district court characterized its findings as "provisional," Pet. App. 55a n.4, and it expressed its conclusions in tentative and highly qualified terms, *id.* at 53a (respondents' interpretation of COPA's coverage "is not unreasonable"); *id.* at 89a (adult verification screens "*may* deter users from accessing such materials" and "the loss of users of such material *may* affect the speakers' economic ability to provide such communications") (emphasis added); *id.* at 94a (blocking software "*may* be at least as successful as COPA would be in restricting minors' access to harmful material online") (emphasis added).

Because the court of appeals did not address whether COPA satisfies strict scrutiny, and the district court did so only in a preliminary way, that issue is not ripe for resolution by this Court. This Court should therefore reverse the court of appeals' judgment holding that COPA's reliance on community standards violates the First Amendment and remand for further proceedings on whether COPA satisfies strict scrutiny.

III. COPA SATISFIES STRICT SCRUTINY

Should the Court choose to address the issue, it should hold that COPA satisfies strict scrutiny. A law satisfies strict scrutiny if it is "narrowly tailored to promote a compelling Government interest." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). COPA satisfies both prongs of that inquiry. This Court has repeatedly held that the government has a compelling interest in shielding minors from sexually explicit material that is harmful to them, even if it is not obscene by adult standards. *Reno* v. *ACLU*, 521 U.S. at 869; *Sable*, 492 U.S. at 126; *Ginsberg* v. *New York*, 390 U.S. 629, 639-640 (1968). Unlike the CDA invalidated in *Reno* v. *ACLU*, COPA is narrowly tailored to achieve that objective. See pp. 18-20, *infra* (discussing how COPA cures the specific problems with narrow tailoring that required invalidation of the CDA).

Respondents nevertheless argue that COPA is not narrowly tailored to achieve the government's compelling interest in protecting minors from material that is harmful to them. That argument is unpersuasive.[2]

A. COPA Applies To A Limited Category Of Material

Respondents first contend (Br. 13-14, 17-21) that "the volume and breadth of protected speech targeted by COPA—like the CDA—is staggering." In order to support that contention, respondents follow "the current fashion in First Amendment litigation." *Regan* v. *Time, Inc.*, 468 U.S. 641, 693 (1984) (opinion of Stevens, J., concurring in the

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[2] Although respondents do not dispute that the government has a compelling interest in protecting minors from the material covered by COPA, they assert (Br. 30) that the government did not "prove" that such material harms minors. This Court has repeatedly recognized, however, that exposure to such material harms the psychological and moral development of minors, *Reno* v. *ACLU*, 521 U.S. at 869; *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639-640, and the record before Congress contains ample evidence confirming that conclusion. See H. Rep. 775, at 11. Further proof is not required.

judgment in part and dissenting in part). Instead of urging the Court to construe COPA narrowly in order to avoid serious constitutional questions, they urge the Court "to adopt the most confusing and constitutionally questionable interpretation of the statute that it could." *Ibid.* Indeed, respondents ignore key statutory language that sharply limits the scope of COPA's coverage, and thereby eliminates the very concerns respondents raise.

Respondents argue (Br. 18) that COPA covers material that conveys information about birth control, sexually transmitted diseases, sexual health, date rape, and homosexuality. Such material, however, has serious value for a legitimate minority of older minors. It is therefore excluded from COPA's coverage as a matter of law. See p. 8, *supra*. In arguing that COPA targets such material, respondents pointedly fail to discuss the serious value prong of the statute. See 47 U.S.C. 231(e)(6)(C) (Supp. V 1999).

Respondents similarly err in asserting (Br. 19) that COPA applies to the millions of communications in chat rooms and on bulletin boards on the Web. In fact, COPA applies only to those who regularly "make[]" harmful communications "for commercial purposes," 47 U.S.C. 231(a)(1) (Supp. V 1999), and a person "shall not be considered to make any communication for commercial purposes to the extent that such person is * * * engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4) (Supp. V 1999). Those who merely "host" chat rooms and bulletin boards and do not "select" or "alter" the content of communications are therefore excluded from COPA's coverage. The persons who actually make harmful communications in chat rooms also are not covered, except in the unusual circumstance where they do so "for commercial purposes."

Equally without merit is respondents' contention (Br. 21) that a Web business is liable under COPA if it makes a single

harmful communication. COPA's obligations apply only to a person who makes harmful communications in the "*regular* course of such person's trade or business." 47 U.S.C. 231(e)(2)(B) (Supp. V 1999) (emphasis added). COPA therefore does not apply to those who make an isolated harmful communication.

Once COPA's textual limitations are taken into account, it is evident that the statute applies primarily to commercial pornographers, just as Congress intended. If COPA applies to a staggering amount of protected speech, it is only because there is a staggering amount of commercial pornography on the Web.

B. COPA Places A Modest Burden On Adult Access To Speech

Respondents also contend (Br. 15-16) that COPA requires Web sites to "deny" adults access to speech they have a constitutional right to receive. COPA, however, contains no such requirement. Instead, it simply requires Web sites that regularly display harmful material for profit to place that material behind an age verification screen. 47 U.S.C. 231(c)(1) (Supp. V 1999).

Respondents argue (Br. 21-30) that adult verification requirements impose unacceptable burdens on adult access to protected speech. That argument fails to take into account the modest burdens associated with Adult IDs. At the time of trial, one adult identification service—Adult Check—would set up an age verification service at no cost to the Web site, and adults could purchase an Adult ID for $16.95 per year. Pet. App. 75a-76a.

Respondents argue (Br. 24-26) that Adult IDs impose an unacceptable burden because adults must give identifying information to a third party in order to obtain them, deterring some adults who want to maintain their privacy. They also express concerns (Br. 26) about the costs of Adult IDs. Respondents vastly overstate the significance of those bur-

dens. At the time of trial, approximately three million people had a valid Adult Check ID. Pet. App. 76a. In light of the substantial and apparently growing use of Adult IDs, the reluctance of "some" to obtain them, *id* at 81a, does not render COPA unconstitutional.

Respondents' other objections to Adult IDs are even less persuasive. For example, respondents claim (Br. 23-24) that an Adult ID requirement would deny access to all adults without credit cards. The district court specifically found, however, that individuals who do not have credit cards can easily obtain an Adult ID by mailing a check and a copy of a driver's licence or passport to an adult verification service. Pet. App. 76a.[3]

Respondents contend (Br. 26-27) that users "offended by certain content" can "drive up" a Web site's costs "by repeatedly accessing restricted content." To the extent that problem is anything other than theoretical, however, it exists only when a Web site requires a viewer to use a credit card number to obtain access to screened content. Pet. App. 73a-74a. A Web site that requires a viewer to gain access with an Adult ID could not experience that problem because repeated use of an Adult ID does not impose costs on a Web operator. *Ibid.*

Respondents also claim (Br. 27) that the district court found that the costs of redesigning a Web site and segregating harmful from non-harmful content could be "prohibi-

[3] Respondents are incorrect in asserting (Br. 24) that, in order to host chat rooms, Web sites would have to place both harmful and non-harmful material behind an age verification screen. It is true that there is no way to prevent minors from obtaining access to harmful content in a chat room without also placing non-harmful content in that chat room behind an age verification screen. Pet. App. 90a. But COPA does not require Web sites that host chat rooms to place either harmful or non-harmful content behind an age verification screen. As already discussed, (see p. 12, *supra*), COPA excludes from coverage those who merely host chat rooms. See 47 U.S.C. 231(a)(1) (Supp. V 1999).

tively expensive." The court made no such finding. Instead, the court found only that the extent of such costs would depend on a number of factors, Pet. App. 78a, that the cost of segregating new content was likely to be less expensive than the start-up costs, *ibid.*, and that Web sites that rely on advertising revenues may already have to segregate sexual content in order to meet the requirements of certain advertisers, *id.* at 57a. The court noted as well that respondents' expert did not view out-of-pocket costs as the real economic burden on content providers, *id.* at 80a, and that the government's financial planning expert concluded that compliance with COPA would not impose unreasonable out-of-pocket costs. *Id.* at 80a-81a.

COPA's adult screening requirement therefore effectively meets Congress's dual objectives: It prevents minors from obtaining access to harmful material without unduly burdening adult access to such material. Respondents apparently believe, however, that Congress may further its compelling interest in protecting minors from harmful material only if it can do so without imposing *any* burden, however modest, on adult access to speech. If that conception of the First Amendment were accurate, this Court could not have upheld the prohibition on sale of harmful material to minors at issue in *Ginsberg*. In order to enforce prohibitions on sale of harmful material to minors, local stores may ask some customers for a driver's license as proof of age. Under respondents' theory, that would impose an impermissible burden on adults who do not want to give out identifying information to a third party.

Respondents' First Amendment theory would also invalidate state display laws. Those laws impose some burden on adults who seek access to material that is harmful to minors. Some adults may steer clear of blinder racks for fear of public embarrassment; others may be disinclined to purchase magazines in sealed wrappers because they cannot peruse them first. Stores displaying harmful-to-minors material

had to incur the start-up costs of segregating such material, and they continue to incur the ongoing costs of segregating new material. And to the extent these costs are passed on to adult customers, the display laws impose a financial burden on those customers as well.

Respondents do not deny that their First Amendment theory would invalidate state display laws. Instead, they point out (Br. 46) that this Court has never upheld the constitutionality of display laws, and that some courts have expressed the view that they raise serious constitutional questions. Courts of appeals and state courts of highest resort, however, have consistently upheld state display laws on the ground that such laws further the government's compelling interest in protecting minors from harmful material without imposing an undue burden on adult access to protected speech. Gov't Br. 24-25, 42-43 & n.5 (collecting cases). COPA is constitutional for the same reason.[4]

C. No Alternative To COPA Would Be As Effective

Respondents contend (Br. 30-33) that COPA's screening requirement is not narrowly tailored because the use of blocking software by parents is less restrictive and at least as effective. As applied to commercial Web sites in the United States that regularly display harmful material, however, COPA's screening requirement is far more effective. COPA *compels* Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' alternative, no entity is required to install filtering software. Blocking software also has several additional built-in limitations. It both blocks certain material that is not harmful to minors and fails to screen out certain material that is harmful to minors. Pet. App. 94a. It can be defeated by a computer-savvy minor. *Id.* at 82a. It

[4] Respondents rely (Br. 16-17) on several cases holding that the government may not limit adults to material that is suitable for minors. Because COPA does not have that effect, those cases are inapposite.

can be expensive for parents to purchase. H. Rep. No. 775, at 19. And it must be updated periodically at an additional cost. *Id.* at 20. COPA's screening requirement does not suffer from those built-in deficiencies.[5]

As respondents note (Br. 30), COPA's screening requirement will not protect minors from all sources of harmful material. It does not apply to non-Web protocols on the Internet and non-commercial Web sites, and its application to foreign Web sites is problematic. Congress reasonably concluded, however, that domestic commercial Web businesses display an enormous quantity of material that is harmful to minors. H. Rep. No. 775, at 7. Congress was entitled to address that serious problem with the most effective means available.

Congress also did not ignore the dangers posed by other sources of harmful material. As to those sources, it concluded that blocking software constitutes the most practical solution currently available. The reason is that non-Web protocols lack the technology for age screening; enforcement of a screening requirement against foreign Web sites would create serious enforcement difficulties; and *Reno* v. *ACLU*, 521 U.S. at 876-877 raised questions about the constitutionality of imposing compliance costs on non-commercial Web sites. In contrast, despite its limitations, blocking software can be used to address each of those sources of harmful material to some extent. For that reason, in a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software. 47 U.S.C. 230(d) (Supp. V 1999); see also H. Rep. No.

[5] Respondents' reliance (Br. 32-33) on *Playboy* is misplaced. There, the alternative identified by the Court *required* cable operators to block undesired channels upon the request of the subscriber, *at no cost* to the subscriber. 529 U.S. at 803-804. Moreover, once the operator blocked the channel, it would *entirely* eliminate the problem of signal bleed *without affecting content on other channels*. Respondents' alternative does not share any of the those features.

775, at 19 (noting that blocking software may be effective for many parents).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Both can work together to prevent minors from being exposed to harmful material, and Congress envisioned that they would. COPA's screening requirement applies where it is far more effective, and blocking software is available to address the sources of harmful material that COPA's screening requirement cannot. In those circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which envisions COPA's screening requirement and blocking software operating together—is significantly more effective in preventing access to harmful material than the use of blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, respondents' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.[6]

D. COPA Cures The Flaws In The CDA

Finally, respondents argue (Br. 12-15) that there is no relevant distinction between COPA and the CDA. But Congress carefully considered the concerns about narrow tailoring that this Court identified in *Reno* v. *ACLU* and successfully addressed them.

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[6] The district court's tentative and highly qualified conclusion that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material" (Pet. App. 94a) addresses the wrong question. The critical points are that COPA's screening requirement is far more effective where it applies, and that, as applied to all sources of harmful content on the Internet, COPA's screening requirement and blocking software are together far more effective than blocking software operating alone. At the very least, "substantial evidence" supports Congress's determination on that issue. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

First, the CDA applied to non-Web Internet communications where age screening was not feasible. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to Web communications, 47 U.S.C. 231(a)(1) (Supp. V 1999), where age screening is feasible. H. Rep. No. 775, at 13-14. Second, the CDA applied to communications made for non-commercial purposes and therefore included large categories of speakers who could not easily afford the costs of age screening. 521 U.S. at 856, 877. In contrast, COPA applies only to Web businesses that regularly make harmful communications on the Web for profit, 47 U.S.C. 231(a)(1) and 231(e)(2)(B) (Supp. V 1999)—a group that can readily afford the costs of compliance. H. Rep. No. 775, at 13-15.

Third, because the CDA applied to materials that were "indecent" or "patently offensive," without defining either term and without making clear whether the "indecent" and "patently offensive" determinations should be made with respect to adults or minors, it raised serious vagueness concerns. *Reno* v. *ACLU*, 521 U.S. at 870-874, 877. In contrast, COPA identifies the particular sexual activities and anatomical features depiction of which may be found to be "patently offensive," and makes clear that the determination whether material containing such depictions is "patently offensive" shall be made "with respect to minors." 47 U.S.C. 231(a)(1) and (e)(6)(B) (Supp. V 1999). Fourth, because the CDA did not require that the covered material "appeal to the prurient interest" or lack "serious educational or other value," it covered vast amounts of non-pornographic materials having serious value. 521 U.S. at 873, 877-878. In contrast, COPA contains all three prongs of the *Ginsberg* test, and therefore applies to the kind of pornographic material that has been behind blinder racks and in sealed wrappers for more than a decade.

Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view covered material. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast,

COPA contains no such intrusion on the parent-child relationship. H. Rep. 775, at 15. Sixth, the CDA defined a minor as any person under 18 years of age, thereby including some persons in their first year of college. 521 U.S. at 865-866, 878. In contrast, COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7) (Supp. V 1999), thereby allowing more mature minors to have access to the material at issue.

Respondents argue (Br. 13) that none of those differences is "constitutionally significant." That argument ignores this Court's decision in *Reno* v. *ACLU*. In explaining why the CDA failed strict scrutiny, the Court relied upon each of the factors noted above. 521 U.S. at 865-866, 870-874, 877-879. Congress responded directly to the Court's decision in *Reno* v. *ACLU* by tailoring COPA in a manner that addresses the very concerns that the Court identified.

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the court of appeals' judgment should be reversed, and the case should be remanded to that court for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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No. 00-1293

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF MORALITY IN MEDIA, INC., FAMILY RESEARCH COUNCIL, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTISTS CONVENTION *IN SUPPORT OF PETITIONER*

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INTEREST OF *AMICI CURIAE*

Morality in Media, Inc., the Family Research Council and the Ethics & Religious Liberty Commission of the Southern Baptists Convention as *amici curiae*,[1] file this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Paul J. McGeady and Co-Counsel Robin S. Whitehead of Morality in Media, Inc., with contribution by Co-Counsel Janet M. LaRue of the Family Research Council and Co-Counsel Shannon Royce of the Ethics & Religious Liberty Commission of the Southern Baptists Convention. No part of the brief was authored by any attorney for a party. No person or entity other than these *amici* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it specializes in providing assistance on issues related to the laws of obscenity, child pornography, broadcast indecency, and the display and dissemination of materials that are harmful to minors. Morality in Media and the American Catholic Lawyers Association filed a brief in the Third Circuit below as *amici curiae* in support of the government's position.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); and *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, No. 00-799 (2001).

Family Research Council, Inc. (FRC) is a non-profit, research, and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, academic community, business leaders, and general public about family and religious liberty issues that affect the nation. FRC is committed to ensuring that the legacy of

family, faith and freedom is not forgotten in America. FRC endorses parental involvement and parental choice in education and works to reduce the federal government's intrusion into local schools, including private and religious schools. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The Ethics & Religious Liberty Commission has an interest in this case as it is the moral concern and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with 16 million members in over 41,000 autonomous local churches. The Commission is charged with addressing public policies affecting the sanctity of human life, morality and religious liberty.

Amici are filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

The Third Circuit's holding that the Child Online Protection Act's ("COPA") definition of "harmful to minors" requires a geographic standard as the measure of what constitutes the community signifies a misunderstanding of the concept of "contemporary community standards."

If left uncorrected by this Court, this misunderstanding could result in the invalidation of the obscenity laws (at least in the Third Circuit) as applied to the World Wide Web. It also conflicts with the decision in *Reno v. ACLU*, 521 U.S. 844 at 878 n.44 (1997), where this Court specifically recognized that federal obscenity laws apply to the Internet stating that "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

Further, *amici* intend to demonstrate that there are narrowly limited classes of speech that are unprotected by the First Amendment, one of which is "nuisance speech." *Amici* submit that material "harmful to minors" transmitted by means of the Internet, intrudes into the privacy of the home and is readily accessible to children, is a form of "nuisance," and as such need not meet the community standards prongs of *Miller* or *Ginsberg*.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT THE "HARMFUL TO MINORS" DEFINITION REQUIRES A "GEOGRAPHIC" STANDARD AS THE MEASURE OF WHAT CONSTITUTES THE "COMMUNITY STANDARD"

COPA's definition of material that is "harmful to minors" combines both the *Miller v. California* test for what is obscene for adults, as well as the definition of what is obscene for minors, found in *Ginsberg v. New York*.[2]

The Court of Appeals' determination that COPA "imposes an overreaching burden and restriction on constitutionally protected speech," *ACLU v. Reno*, 217 F.3d 162, 176 (3rd Cir. 2000), was based on their incorrect First Amendment analysis of "COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." *Id.* at 173. The Court reasoned that:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. 217 F.3d at 166.

[2] Compare 47 U.S.C. 231(e)(6) with *Miller*, 413 U.S. 15, 24 (1973) and *Ginsberg*, 390 U.S. 629, 632-633 (1968).

This rationale signifies a misunderstanding of the concept of "contemporary community standards." In order to understand the concept of "contemporary community standards," it is vital to look at the seminal case of *Miller v. California*, 413 U.S. 15 (1973), where both the definition of, and the test for, obscenity are found as currently applied in federal and state courts throughout the United States.[3]

The definition of obscenity is the essence of what will be deemed to be obscene. It does not contain any element of community standards. As stated in *Miller* at 413 U.S. at 24 the definition reads:

> Works which, taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value.

Miller then provides the test for determining whether something is obscene:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* [Emphasis added.][4]

The *Miller* Court goes on to explain the concepts of "average person" and "contemporary community standards" as used in the test for obscenity (and not its definition) at 423 U.S. at 33-34:

> As the Court made clear in *Mishkin v. New York*, 383 U.S., at 508-509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one.

This Court's concern in establishing this test was to insure that the juror be directed not to apply his or her own

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[3] *Amici* note that this Court in *Roth v. United States*, 354 U.S. 476 (1957), first approved the concept of "contemporary community standards" to assist in obscenity determinations. The test at that time was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. More significant than the actual test in *Roth* (since the current test is that found in *Miller*) is the trial court's jury instruction on the community standard (with which the majority in *Roth* agreed):

> "[Y]ou determine its impact upon the average person in the community... You may ask yourselves does it offend the common conscience of the community by present-day standards." *Id.* at 490.

[4] *Amici* point out the distinction between the definition and the test of obscenity to show that the concept of "community standards" is not an element of the definition and therefore, *amici* submit that a person could arrive at the concept of "obscenity" as an abstraction even if he or she were to prescind from the community standards concept or for example used "reasonableness" in place of the community standards test. *See Hamling v. United States*, *infra*.

individual standard, but to seek the mean of the community for the obvious purpose of fairness to the defendant. The Supreme Court was not concerned with which particular "community standard" would be applied, as long as the jurors are instructed not to use their own personal standard, but instead to find a mean.

In *Hamling v. United States*, 418 U.S. 87 (1974), this Court discussed the concept of "contemporary community standard" and interpreted *Miller* to hold that no precise geographical area is a constitutional requirement for establishing the relevant community. The Court stated in *Hamling* at 104-105:

> *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene... But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of "the average person, applying contemporary community standards." *Id.*, at 24, 93 S.Ct., at 2615... A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law... Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law. [Emphasis added.]

Amici submit that it is impossible to read *Hamling* and conclude that the test for obscenity requires a geographic standard. Since the test under COPA, to determine whether material is harmful to minors, *viz.* obscene for minors, utilizes the same concept of community standards, as does the test for obscenity, it follows that COPA cannot be interpreted to require a geographic standard. The Third Circuit apparently so believed and is therefore in error.

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the same day that the Supreme Court decided *Hamling*, the Court further explained the "contemporary community standard" as set forth in *Miller*, when it reversed the trial court's conviction of defendant for the distribution of obscene material. The Court stated at 157:

> We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary

> community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*. [Emphasis added.]

In *Smith v. United States*, 431 U.S. 291 (1977), a case involving a conviction under the federal statute that proscribes the mailing of obscene materials, the Supreme Court was faced with deciding:

> Whether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as s.725 of the Iowa Code. Put another way, we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be.... *Id.* at 302.

Citing *Hamling*, the *Smith* Court reiterated its analogy between the function of "contemporary community standards" in obscenity cases, and "reasonableness" in other cases and stated at 302:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. *Hamling*, 418 U.S. at 104-105.

Smith further clarified that community standards are not an element of the obscenity crime, but with respect to the first two elements of the obscenity test, are to be used as a measure or reference point regarding what is accepted in the community from where the jury is drawn. The Court stated:

> Obviously, a state legislature would not be able to define contemporary community standards in a vacuum. Rather, community standards simply provide the measure against which the jury decides questions of appeal to prurient interest and patent offensiveness. *Id.*

Amici submit that "community standards" are required to be applied by the trier of fact in accordance with his or her own understanding of its meaning in his or her community. The Supreme Court has clearly held that the measuring by the trier of fact of these two elements against contemporary community standards does not mean that their discretion goes unchecked.[5]

[5] *See Hamling*, 418 U.S. at 114 and *Jenkins*, 418 U.S. at 160-161, where the Court emphasized that the second part of the *Miller* test relating to "patent offensiveness" contains a substantive component, in that the kinds of conduct that a jury would be permitted to label as "patently offensive," are the "hard core" types of conduct suggested by the examples given in *Miller*.

II. If the Court of Appeals Holding that "Community Standards" are to be Determined Only on a Geographic Basis as Applied to the World Wide Web is Affirmed, then Obscenity Laws Relating to the World Wide Web Would be Invalid

If the Third Circuit's determination that no geographic standards can be applied to material deemed obscene for minors on the World Wide Web is affirmed, then the obscenity laws relating to the Web would be presumptively invalid, not just the "harmful to minors" language of COPA. The court below stated at 217 F.3d 162, 180:

> We remain satisfied that *Miller's* "contemporary community standards" test continues to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology... *Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.[6]

This finding by the court below directly conflicts with Supreme Court prior obscenity decisions,[7] including *Reno v.*

[6] It is apparent that the Third Circuit is throwing out the *Miller* standard as relating to the Web, not only from the above language, but also because "obscene" material was at issue along with the language of "harmful to minors."

[7] *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996), addressed the issue of community standards relative to the Internet and found that obscenity violations over the Internet could be prosecuted. Although the Court limited its holding to the specific facts of the case, i.e., where an operator of a bulletin board service knew where its

ACLU, 521 U.S. 844 at 878 n.44 (1997), where the Court unanimously upheld, as being constitutional on its face, Section 223(a)(1)(B)(ii) of the Communications Decency Act, which prohibits the transmission of "obscene" messages to any recipient the sender knows is under 18 years of age. In doing so, this Court specifically recognized that federal obscenity laws apply to the Internet when it stated:

> Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.

The Third Circuit Court's belief, evidenced by its holding that obscenity laws must be geographic, caused it to incorrectly "find" that harmful to minors laws must also be geographic. As such, that Court misapplied the concept of community standards and came to a result which contradicts this Court's prior approval of the obscenity test as applied to the Internet. This Court should now correct the Third Circuit's error by properly finding that COPA's definition of harmful to minors is constitutional, since it uses a valid test. This Court has already sanctioned the applicability of obscenity laws for the Internet.

members were located through it's membership procedures, the Court properly applied the "contemporary community standard" measure of the test for obscenity found in *Miller*.

III. "HARMFUL TO MINORS" MATERIAL COMMUNICATED BY MEANS OF THE INTERNET INTRUDES INTO THE HOME AND IS READILY ACCESSIBLE TO CHILDREN. AS SUCH, IT CAN BE CONSIDERED A FORM OF "NUISANCE SPEECH" THAT NEED NOT MEET THE "COMMUNITY STANDARDS" PRONGS OF *MILLER* OR *GINSBERG*

There are narrowly limited classes of speech that are unprotected by the First Amendment. One such class is "nuisance speech." *Amici* submit that material that is "harmful to minors," which intrudes into the privacy of the home, and is readily accessible to children by way of the Internet, is a form of "nuisance."

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first "alluded to" by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court stated at 571-572: [8]

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene... those which by their very utterance inflict injury or tend to incite an immediate breach of the peace... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The nuisance rationale was also applied by the three dissenting Justices in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). Justice Powell, with whom the Chief Justice and Justice Blackmun joined, wrote at 408 U.S. 905-906:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience... [A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the... subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance... The Model Penal Code... also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection]. [Emphasis added.]

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[8] *Amici* use the phrase "alluded to" because the below quoted material from *Chaplinsky*, while not specifically mentioning nuisance speech, twice cites to *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does mention nuisance speech at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity... because the very utterance of such words is considered to inflict a present injury upon listeners, readers... [P]roperly limited they fall outside the protection of the free speech clauses... [P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see... The man who swears in a street car is as much of a nuisance as the man who smokes there. [Emphasis added.]

In *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Kovacs v. Cooper*, 366 U.S. 77 (1949), this Court upheld nuisance ordinances aimed at means of communication that intrude into the privacy of the home. As the Court in *Kovacs* stated at 366 U.S. at 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens for comfort and convenience. That more people may be more easily and cheaply reached by sound trucks... is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. [Emphasis added.]

In *Hess v. Indiana*, 414 U.S. 105, 107-108 (1973), this Court again identified speech that amounts to a public nuisance as being outside the protection of the First Amendment:

> It hardly needs repeating that "the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" *Gooding v. Wilson, supra*, at 521-522... Hess' words could be punished as obscene... By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), could not withstand scrutiny... In addition, there was no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded. [Emphasis added.]

See also Redrup v. New York, 386 U.S. 767, 769 (1967), (recognizing a need for government protection against an "assault upon individual privacy.")

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) this Court affirmed the FCC ruling that found the monologue, "Filthy Words," as broadcast, to be indecent and prohibited by 18 U.S.C. 1464. In so doing, the Court observed that the ruling "rested entirely on a nuisance rationale under which context is all-important." *Id.* at 750.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by both students and faculty. Justice Stevens (dissenting on due process grounds) noted at 696:

> [A] nuisance may be merely a right thing in the wrong place -- like a pig in the parlor instead of the barnyard... Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others... It seems... obvious that [the] speech would be inappropriate in certain... settings.

Amici submit that material "harmful to minors" which, by means of the Internet, intrudes into the privacy of the home and is readily accessible to children is also "nuisance speech" which is unprotected by the First Amendment and which Congress can regulate, as it has chosen to do by enacting COPA to restrict children's access to material that is harmful as to them and which is readily available on the Internet.[9]

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[9] *See Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), where Justice Breyer, writing for the Court, is critical of the absolutist approach of Justices Kennedy

and Thomas relative to regulation of leased access channels and says at 740:

> Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. The history of the Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command... has been applied to new circumstances requiring different applications of prior principles and precedents... our cases have not left Congress or the States powerless to address the most serious problems (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); and *FCC v. Pacifica*, 438 U.S. 726 (1978)).

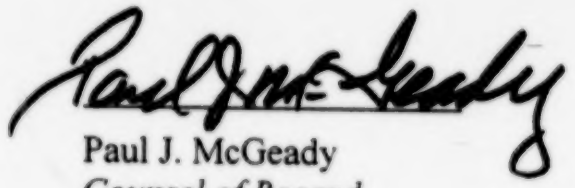
The Court continues at 740-743:

> Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application... This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems. This Court... has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

CONCLUSION

For all of the aforementioned reasons, your *amici* pray that this Honorable Court reverse the judgment of the court below or in the alternative, remand for additional consideration and study.

Respectfully submitted,



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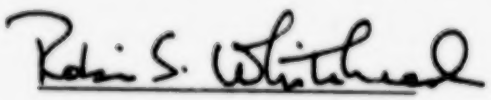

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Supreme Court, U.S.
FILED
JUL 5 2001
CLERK

No. 00-1293

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF CALIFORNIA STATE SENATOR RAYMOND N. HAYNES, CAPITOL RESOURCE INSTITUTE, and CAMPAIGN FOR CALIFORNIA FAMILIES IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 00-1293

JOHN ASHCROFT, ATTORNEY GENERAL,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CALIFORNIA STATE SENATOR RAYMOND N. HAYNES, CAPITOL RESOURCE INSTITUTE, and CAMPAIGN FOR CALIFORNIA FAMILIES IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE* [1]

California State Senator Raymond N. Haynes represents 800,000 Californians in the California Legislature. He was elected in 1994.

[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief had been granted by counsel for Petitioners and Respondents in this case. Such written consent of all parties has been lodged with the Clerk of this Court.

In 1996, Senator Haynes was elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he is responsible for generating Republican analyses for the thousands of bills that reach the Senate Floor. He also serves as Chair of Constitutional Amendments Committee, Vice Chair of the Senate Judiciary Committee, Senate Health and Human Services Committee and the Public Employment and Retirement Committee, along with being a member of the Budget and Education Committees.

In 2000, Senator Haynes served as the National Chairman of the American Legislative Exchange Council (ALEC), a national bipartisan organization of over 2500 state legislators.

Capitol Resource Institute ("CRI") is a nonprofit organization that develops positive policies that affect culture and government in the State of California. CRI advocates on issues that affect California's families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers expert analyses and commentary on key issues of public policy in the State of California.

Campaign for California Families ("CCF") is a nonprofit, nonpartisan family defense and lobbying organization serving families in the State of California and across the nation. CCF promotes the innate worth of all individuals, but advocates against behavioral choices that are detrimental to society, family and the general welfare of the individual states and the nation as a whole.

SUMMARY OF ARGUMENT

One thing that our Nation should be certain of is that our schools, libraries, family residences and children's bedrooms were never intended to provide an open gateway to the same materials as might be offered at an adult bookstore or adult movie theater. Nor can it be reasonably surmised that our

Founders envisioned a situation whereby children could be easily lured through the First Amendment into the dark netherworlds of online pornography, instant images of bestiality, pedophilia, and other elements of, arguably, Man's darkest side. Quite properly, "[T]he State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men, [women], and citizens." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968), citing, *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 at 165 (1944). See also, *Reno v. American Civil Liberties Union* 521, U.S. 844, at 869 (1997).

If adults and children are mutually given unfettered access to adult and obscene materials via the Internet, including Internet video, pictures and literature, a child's computer is essentially converted into an adult bookstore. The only difference is that an adult bookstore is subject to age-appropriate identification and appropriate zoning regulation. It only makes sense that the all access points (specific server sites, book and/or video stores, liquor stores, magazine racks, libraries, etc.) to harmful materials are *consistently* regulated for the protection of minors and the general public

To allow inconsistent regulation would be to engage in favoritism of the Internet to the exclusion of other speech media. Equal Protection would seemingly militate against any such form of public policy. Moreover, the First Amendment has been given its necessary breathing room since an Internet publisher can give free access to anything that is not harmful by the liberal standards set forth in *Miller v. California, infra.*

By conceptual analogy, it has already been held by this Court that a 'corporeal' community may outlaw home solicitation, of otherwise protected materials, in the interest of balancing the needs of residential privacy and a publisher's right to distribute information. *See, Breard v. Alexandria,*

341 U.S. 622 (1951). *See* also, *Frisby v. Shultz*, 484 U.S. 1003 (1988). In the present instance, Congress has clearly recognized that commercialized adult material in America's cyber-community can and does invade homes against the right of the parent to raise their child as they see fit. *See*, 47 U.S.C. 231 note (Supp.IV 1998) (Finding 1). *Also see*, *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. On Telecomm., Trade, and Commerce*, 105th Cong., 2nd Sess. (1998); S. Rep. No. 225, 105th Cong., 2nd Sess. 8 (1998); *Ginsberg*, 390 U.S. at 639. By enacting COPA, Congress has done no more than insure that a careful balancing act has been done per *Breard, Frisby* and *Miller v. California*, 413 U.S. 15 (1973). *See also*, H.R. Rep. No. 775, *supra* at 12 (1998); S.Rep. No. 225, *supra* at 2.

Indeed, protection of minors has already been held to be a *compelling* state interest. "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See also*, *Reno v. ACLU*, supra at 869. Here, the issue is whether Congress has used narrow constitutional means to carry out this interest. As shown below, it can be concluded that Congress did use the most logical and narrow means of protecting children against harmful materials.

If one assumes that it is generally wrong to distribute obscene or harmful material to children, Respondents' position makes it clear that certain Internet participants do not want to be deemed capable of making socially responsible choices about the material that they make available to all Internet users, including children. Wrongly, the lower court has left one to assume that certain Web providers do not feel that the have the moral capacity to decide whether or not the material that they are distributing is violative of existing legal and community standards in American society.

Instead, the arguments espoused by Respondents seem to suggest that it is up to the state to completely define social responsibility for the Web provider. One is told that it is wrong to require that every Web publisher abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. One is further expected to believe that, unless, the state can come up with a standard definition of what is "harmful" to children, by a community-based standard, that no legislation may be passed which might curtail the right of Web operators to disseminate whatever they wish. This laissez-faire attitude is adopted even at the risk of ruining the moral value of this Nation's children, the rights of parents to raise their children in a way befitting to moral integrity, and the Web provider's own freedom and responsibility to make moral judgments about what is right and wrong.

To further suggest that current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user is irresponsible. The Constitution recognizes that every participant in the marketplace of ideas can be held responsible for obscene, inciteful, or defamatory speech, regardless of whether or not the marketplace is in one geographical area state versus another. Cf., *Hamling v. United States*, 418 U.S. 87, 104-108 (1974). One speaks at his own peril if one chooses to engage in unprotected speech conduct or expression. Our Nation does not afford a 'right' to speak in an obscene way to children. As so eloquently stated by Abraham Lincoln, "One cannot have the right to do what is wrong." COPA simply reiterates this philosophical concern within the context of the Internet.

Reasonable minds can agree that children need not be exposed to harmful materials, regardless of geographical limits or a self-proclaimed inability to protect children. *See*, H.R. Rep. No. 775, *supra* at 13, 27-28. Indeed, Congress represents the voice of all local communities and government

by representation seemingly confers the right to bring decency standards to a national level. When Respondents question the integrity of COPA, they *a priori* question the collective findings and reasonableness of millions of Americans.

Finally, it is no substantial burden on Free Speech that one be prevented from doing or promoting what may be illegal in the first place. *See*, *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990) [re child pornography]. *Also see*, *United States v. Reidel*, 402 U.S. 351 (1971) [re mailing of obscene matter per 18 U.S.C. § 1461]. In sum, it is well within Congress' rights to determine that adult content is harmful to the morality of minors and to regulate accordingly. *Ginsberg v. New York*, 390 U.S. 629 (1968).

I. COPA IS CONSISTENT WITH CONGRESS' RIGHT TO PROTECT CHILDREN AND DOES NOT VIOLATE THE FIRST AMENDMENT

This case does not present with any violation of fundamental rights. The First Amendment is a manifestation of the inherent right of Man to seek truth. It is premised on the notion that, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by the free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out." *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919).

Indeed, "A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be

legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." . . . [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." *Young v. American Mini Theaters*, 427 U.S. 50, at 63-64 (1976).

Importantly, this Court has never stated that there is a First Amendment right to distribute harmful, 'adult', or obscene material to children or to make sure that children have free access to such materials. *Ginsberg*, *supra*. Moreover, there is no right to distribute information, electronic or otherwise, in a way that a government agency believes to be in violation of time, place and manner restrictions. *City of Renton v. Playtime Theaters*, *infra*. Whilst it may be true that the First Amendment graciously affords rights to peaceful assembly and to express oneself through 'adult' messages, there is no tenable claim for First Amendment protection in the conduct of viewing of others engaged in sexual activity, on videotape or via Internet, in or by way of a commercial setting. Cf., *Paris Adult Theatre I v. Slaton*, 413 U.S. 41 (1973). Here, Congress has actually limited its reach to commercial settings and has fully respected the rights of private citizens to possess and distribute materials amongst themselves. 47 U.S.C. § 231(a)(1) (Supp. IV 1998).

This Court has recognized that materials which appeal only to prurient interests may already exist at the outer fringes of the First Amendment. Indeed, it would seem inconsistent to give any greater protection to obscene or other harmful materials on the Internet. In *American Mini Theaters*, *Id.* at 61, Justice Stevens, writing for a plurality of this Court, stated that, "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the

free dissemination of ideas of social and political significance . . . " Further, "[t]he States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger public safety, or to jeopardize the States right to maintain a decent society." *Paris Adult Theatre*, 413 U.S. 49 at 68.

As further recognized in *American Mini Theaters*, *Id.* at 63, "[A]part from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of the material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." Adult Web site providers should not be treated differently than adult movie theaters. While it is true that there is a private right to view and possess 'adult' materials, it is not true that one can engage in such conduct wherever, however and whenever one sees fit. *See generally*; *Stanley v. Georgia*, 394 U.S. 557 (1969). Conversely, it only makes sense that a purveyor of 'adult' materials may not distribute them in any way that they see fit. *See*, *United States v. Thirty-Seven Photographs*, *infra*. As a matter of common sense, it seems incongruent to suggest that the individual physical elements of cyber-space cannot be regulated. Behind every Web post there is an identifiable site and a human operator responsible for having posted the material.

Implicit in the above analyses is the Constitutional inference that a State need not prove to a jury that every act of commercial distribution and exhibition of pornographic materials is offensive to the First Amendment. In fact, in assessing potentially "obscene" materials, this Court found that it was not "error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [cites]." *Paris* at 56. Indeed, the power to make a neutral judgment regarding the time, place and manner in which such materials

can be placed on exhibit is well within the province of the Courts. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986).

Under COPA, the daily responsibility for handling such materials resides with those who produce and distribute such materials. In fact, under 47 U.S.C. § 231(c)(1)(C), the producer can completely avoid community standards by doing no more than using "reasonable measures that are feasible under available technology." This reflects the very zenith of First Amendment protections and constitutes a hands-off approach by the State which protects children at the same time. Nevertheless, Respondents are claiming foul because the government does not have 'enough evidence' to support its *optional* requirement of digital certificates, credit card information, or debit account information as a means of controlling access to harmful materials.

Respondents' position overlooks the fact that, where a State's determination as to harmful effects relies on "various unprovable assumptions," there is no offense to the Constitution. "Such assumptions underlie much lawful state regulation of commercial and business affairs [cites]." *Paris* at 61-62. Here, unprovable assumptions about the exact methodology by which a provider might guard against children's access should not prevent enforcement of COPA.

As a matter of the people's rights, it is already established that there is an "interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris* at 58. Indeed, there is a "right of the Nation and of the States to maintain a decent society . . . " *Id.* at 59, citing *Jacobellis v. Ohio*, 378 U.S. 184, 199 (Warren, dissenting opinion) (1964). Accordingly, "[i]t is not for [this Court] to resolve empirical uncertainties underlying [. . .] legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself."

Paris at 60, *citing*, *Ginsberg v. New York*, 390 U.S. 629, 642-643 (1968).

Prior to *Renton*, this Court stated that, "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Succinctly stated, nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* at 49, 63.

II. BEING THAT THE INTERNET IS A MIRROR OF THE CORPOREAL MARKETPLACE OF IDEAS, IT SHOULD BE SUBJECT TO REGULATIONS SIMILAR TO THOSE IMPOSED ON OTHER MARKETPLACE PARTICIPANTS

"The information available on the Internet is "as diverse as human thought."" *American Libraries Association v. Pataki*, 969 F. Supp. 160, 164 (1996), citing *ACLU v. Reno I*, 929 F.Supp. 824 (E.D.Pa. 1996). Indeed, its "[c]ontent ranges from academic writings, to art, to humor, to literature, to medical information, to music, to news, to sexually oriented material." *Cyberspace Communications, Inc., v. Engler*, 55 F.Supp.2d 737 (E.D.Mich. 1999), citing *Pataki* at 164. As in the non-Internet world, at least some of the aforementioned material could rise to the level of being 'obscene.' "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id.* at 746, citing *Kois v. Washington*, 408 U.S. 229 (1972).

Again, by analogy, in *Acara v. Cloud Books*, 478 U.S. 697 (1986), this Court held that a bookstore could be lawfully closed down where illegal activity was taking place at the site

(i.e. prostitution). While no obscenity charge was made by the prosecution, it was properly held that the First Amendment did not bar the closure. At most this was an incidental burden on Free Speech rights. Here the only burden placed upon Respondents is that they use the "reasonable" technological means to prevent violations of law. If there are no such means under 47 U.S.C. § 231(c)(1)(C), then one can only assume that Respondents would be able to show the same to a jury and be absolved of any liability under COPA.

In *United States v. Reidel*, 402 U.S. 351 (1971), this Court held that the mailing of obscene materials could be lawfully prohibited. While it was true that *Stanley v. Georgia*, 394 U.S. 557 (1969) may have given citizens a right to privately possess "obscene" materials, *Stanley* did not confer a right to distribute or sell obscene materials. The same can be said here since adults may have the right to possess certain Internet materials. However, the same right cannot be *always* extended to minors. *See*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 at 212, citing *Ginsberg*, *supra*.

To further support the position of *Amici Curiae*, this Court, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), held that the private right to possess obscene materials could not be extended to the commercial importation of such materials. Of importance here, it was held that the right of a possessor "does not extend to one who is seeking . . . to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution." *Id.* at 376. In accord, *United States v. 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) [as to importation for exclusively private use]. By analogy, it only makes sense that Congress has the right and obligation to legislate against minors' importation of harmful materials from a provider's Web site. In the view of *Amici Curiae*, the best way to limit

importation of a commodity is by eliminating its supply and source (i.e. the individual Web information provider).

Lastly, in *United States v. Orito,* 413 U.S. 139 (1973), this Court held that 18 U.S.C. § 1462 did not violate the First Amendment when applied to the interstate transportation of obscene materials by a common carrier. Of high importance to the instant matter, it was stated that "[W]e cannot say that the Constitution forbids comprehensive regulation of interstate transportation of obscene material simply because such transport may be by private carriage, or because material is intended for the private use of the transporter . . . Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of the transporter's professed intent." *Id.* at 143. Since the Internet does not recognize state lines, *ACLU v. Reno III*, 217 F.3d 162, 168 (2000), it seems consistent with *Orito* that this Court should conclude that the private electronic transmission of harmful materials is no different than 'corporeal' means of transporting the same substantive materials.

In short, the restrictions imposed by COPA have only an incidental impact on free speech as no protected material is specifically banned. COPA, in exclusively addressing the *manner* in which the Web site operator conducts business, is narrowly tailored. Since it can already be illegal to commercially provide or distribute obscene or pornographic materials to minors, it is of no concern that a provider be limited from doing what they may have no right to do in the first place.

III. GIVEN THE NATURE OF THE INTERNET, CONGRESS USED THE MOST NARROWLY TAILORED MEANS AVAILABLE TO LIMIT MINORS' ACCESS TO HARMFUL MATERIALS

This Court has stated that, "Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg v. New York*, 390 U.S. 629, 639-640, 88 S.Ct. 1274, 1280-81, 20 L.Ed.2d 195 (1968); *New York v. Ferber*, 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354-55, 73 L.Ed2d 1113 (1982). The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. May of Oradell*, 425 U.S. [610], at 620 [96 S.Ct. 1755, 1760, 48 L.Ed.2d 243]; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 686 [98 S.Ct. 1407, 1421, 55 L.Ed.2d 707] (1978)." *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980). It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of California, Inc. v. FCC* 492 U.S. 115 at 126 (1989).

While one might be inclined to argue that the Respondents are not, in any way, advocating child's participation in pornography or obscenity, they are suggesting that Congress should presently ignore the fact that children are being given unfettered access to obscene pornography and other harmful materials. It has already been stated by this Court that, "as the mode of expression moves from the printed page to the commission of *public acts* which may themselves violate valid penal statutes, the scope of permissible state regulation significantly increases. [emphasis added]." *California v. LaRue*, 409 U.S. 109 (1972). The Internet is just one means by which a commercial venture can share harmful materials with a minor. The act is public by virtue of the fact that the Internet does not recognize state lines and can be omnipresent across all intrastate divides. *Reno, supra.*

Nevertheless, it is somehow suggested by Respondents that it . . . may even be a parent's fault if a child stumbles across the inviting hand of a pornographer, is taken by the hand, and shown material that has no proper place in the psyche of a child. Even though the individual provider is responsible for the content maintained on their own server, one is expected to believe that Web content providers should somehow be less responsible for what they do than would be any other participant in the marketplace of ideas.

One would think that it would be fair to state that all bear an equally narrow burden of acting responsibly with the speech that utters and distributes. Accordingly, it is valuable to recognize that this Court is as much a guardian of the rights of parents, as recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as it is those of the rights of Web site providers. *Reno, supra. Amici Curiae* suggest to this Court that, since the family unit rests nearer to the core of this Nation's humanity than those interests which would create and distribute obscene materials, that any benefit of public policy doubt should be weighed in favor of Congress in this instance.

Oddly, only America's purveyors of Internet obscenity are allowed to completely blame the child or her parents for the fact that access was gained by a child. The purveyor is further allowed to extend his hand into this Nation's homes, libraries and schools and know that it is safe to do so since it cannot possibly know what "decency standard" applies in the geographical area of the child's computer access point. If Congress were to dare to define nationwide decency standards, Respondents would be unhappy as well. So long as nothing can satisfy Respondents in terms of reasonable accountability and a small price to pay for the freedoms of the First Amendment, America's children will have to continue being mentally molested. This can hardly be the law of this civilized and compassionate Nation.

A. The Court Should Apply a Modified *Renton* Analysis to the Child Online Protection Act

As a matter of historical fact, it has been found time and again by municipalities and legislatures that publicly available sources of "adult" and obscene materials present with negative secondary effects on the public. E.g. *Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). There is an established empirical connection between the materials being viewed at adult businesses and negative physical effects on surrounding communities. Such effects have been said to include increased violence against women, lewd conduct, prostitution, hostile work environments, increased sexual harassment and a whole host of other undesirable effects. Indeed, these effects have been attributable to *adult* viewing of such materials. One can reasonably surmise that the aftereffects of such materials being made available to minors can only be worse.

In addressing the concerns associated with other sources of obscene materials, state and federal courts have adopted what are known as "time, place, and manner" restrictions. Cf.

Renton, supra, *Erznoznik*, *supra* at 209. So long as the restriction is content-neutral, there is no constitutional infirmity in adopting such regulations. While not specifically content-neutral, the Child Online Protection Act is a narrowly tailored means of dealing with the direct and indirect (secondary) effects that online obscenity has on America's children and their parents. *See*, 47 U.S.C. § 231 note (Supp. IV 1998) (Finding 3). Simply stated, the regulation of the physical manner in which adults received their "protected" adult materials is not a form of censorship. The physical burden placed on Web site providers is *de minimis* when weighed against the primary and secondary harms sought to be curtailed.

COPA does not need to have the empirical evidence necessary to support its conclusions about the 'harmfulness' of certain First Amendment expressions. As pointed out by this Court in *Renton*, supra, a state need not resolve every empirical difficulty before it may legislate in an area concerning even the First Amendment. This is for the simple reason that the legislatures need broad power in order that they may carry out their necessary functions.

Along these lines, it is argued by Respondents that the reluctancy of adults to provide identification information to a Web site provider is an undue burden on the First Amendment. However, the reluctancy of adults who want sexually explicit materials hardly rises to the level of being a governmental restriction on protected speech. One would be hard pressed to claim that the reluctancy to provide information to a Web site provider could be any qualitatively worse than whatever reluctancy one might have to provide identification to a ticket booth at an adult theater or to the seller of adult materials. One would think that those who wish to indulge in adult content would be more than happy to substitute the private provision of age-identification from their homes than they would in having to make a public display of the identification process. America's children

should not be put at risk simply because an adult might have to make an intensely personal decision about whether they want a provider of adult content to have their identification information.

A user-based blocking system is, as a matter of common sense, not likely to be a pragmatically available solution to the problems presented by underage access to adult materials. *See*, 47 U.S.C. § 231 note (Supp. IV 1998) (Finding 4). One need not be a parent for long to understand that children often have a better grasp of modern technology than their parents. It is reasonable to assume that Congress intended to address this fact by placing the minor burden to protect minors on those who know the most about 'filtering' systems and the *time, place and manner* in which such technology can be used by Web providers. *Id.* It is simply unreasonable to place the burden on parents, libraries or schools since they are the least equipped to understand the technology necessary to assist the state in carrying out its compelling interest in protecting our Nation's children from established harms. *Id.*

B. Parents Should Not be Forced to Bear the Entire Burden of Protecting Children on the Internet Frontier

Here, Respondents rely on the statement that, "Although it is difficult in today's society to constantly monitor the activities of children, it is still the right, and duty, of every parent to teach and mold children's concepts of good and bad, right and wrong. This right is no greater than in the confines of one's home. A family with values will supervise their children. This includes setting limits, and either being there to enforce those limits, or utilizing the available technology to do so. With such less restrictive means to monitor the online activities of children, the government need not restrict the right of free speech guaranteed to adults." *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.2d 737, 752-753 (E.D.Mich. 1999).

However, within the Internet, the proverbial foxes have been left with the keys to the chicken coop. While claiming that there is no way to regulate the Internet, the Respondents, and those interests that they represent, would have it that they cannot control the Internet, even though they *collectively* run it, yet place the same burden on parents. Moreover, Congress is not asking any individual to control the whole of the Internet. It is only asked that each commercial participant make some individual effort to protect children—with the obvious hope of a combined effect on the safety of children. Incredibly, COPA gave Respondents the benefit of the doubt by allowing them to avoid all community standards, other than their own, by using "reasonable" means to prevent minors' access to harmful materials. 47 U.S.C. § 231(c)(1)(C).

Nevertheless, Respondents seemingly confuse the nature of the societal protections involved in this case. While it is true that every adult who has to take additional steps to insure that minors do not gain access to "harmful" materials has a burden to bear, it is not true that this responsible burden is inconsistent with their own First Amendment rights. *See, U.S. v. Reidel, U.S. v. Thirty-Seven Photographs, supra.* Here, the fact that the geographic location of a minor can't be verified by a Web site operator is irrelevant to a duty to protect the child wherever they might be. The bottom line is that the Web site operator acts as a gatekeeper to all who access their site much in the same way that any store keeper might open and close their doors to certain customers.

While it is true that a Web site operator may never be able to stop all minors from accessing information, the same could be said of any barkeep who prevents minors from entering a drinking establishment, all liquor store owners who are required to inspect identification before selling alcohol, or even pornographers themselves who are required to insure that their 'actors' are of majority age. Again, placing focus on the location of a minor in cyberspace breeds a fundamental

misconception as to the access point to "harmful" materials. Respondents fallaciously assume that what is true of the Internet frontier as to its uncontrollable size and scope must also be true of the individual parts that make up the Internet. In logic this is a classic case of the fallacy of division. *See*, Dauer, Francis Watanabe, *Critical Thinking: An Introduction to Reasoning* (Oxford University Press, 1989) pp. 252-253; Hurley, John, *A Concise Introduction to Logic* (Wadsworth Publishing, 1997) pp. 170-172.

In reality, each Web site operator's server is but a small access point in cyberspace that is under the complete control of the individual operator in the same way that any storefront might be. COPA has apparently accounted for these common sense realities by providing affirmative defenses based on the notion that an individual operator need only use the most reasonable means available to control the access point to "harmful" materials. 47 U.S.C. § 231(c)(1). Quite graciously, Congress has made it such that a Web site operator can generate and use their own "reasonable measures" or those measures suggested by Congress after making findings of fact on the physical nature of the Internet. *Id.* This goes well beyond the requirement that Congress use narrowly tailored means to carry out its mission of protecting children.

IV. COMMUNITY STANDARDS ARE NOT RESTRICTED BY THE LOCATION OF A MINOR

As indicated above, the location of a user is not so important as the fact that a Web site operator has absolute control over what can be accessed at the *individual* server or file level. *American Libraries Association v. Pataki*, 969 F. Supp. 160 at 166 (1996). This said, it is a burden to differentiate between the different applicable "community standards" that may apply in any given user's geographical area. However, this is not too significant a burden to place upon those who might distribute harmful, obscene or pornographic material. *Ginsberg v. New York*, 390 U.S. 629,

642-643 (1968). *See also*, *Hamling*, 418 U.S. 104-106 (1974). All laws impose a burden on those who might be affected by the People's voice.

Here, it might be wise to actually insist that the "community standards" test be applied in a conservative way to the Internet as it poses the greatest potential of quickly and effectively delivering harmful material to minors. Indeed, the risk to minors can be fully realized in a mere instant. *Pataki* at 167. The standards that apply to adult access to "obscene" materials cannot be properly applied to minors. *Ginsberg* at 638-639.

The First Amendment cannot be construed in such a way that one is completely able to shirk whatever obligation there may be to society in terms of protecting our children. E.g., *Ginsberg* at 360 U.S. 634-636. Moreover, Congress should not be forced to abstain from legislating against the powerful influence of the Internet on our children. "[T]he State . . . has an independent interest in the well-being of its youth." *Id.*, at 390 U.S. 640.

Knowing the above. Respondents nevertheless wish to place Congress in a false dilemma whereby it cannot leave discretion open to the Web site operator as with COPA *nor* too carefully define what is "harmful" for fear of having Respondents claim that there is overbreadth or content-based discrimination. (*Reno III* at 217 F.3d at 171-172). In short, it is apparent that Respondents simply don't want Congress to have any input as to how the Internet is operated even though it is a clearly identifiable element of intrastate commerce.

Having no standard cannot be the call of the day when the moral and spiritual lives of children are at risk. One can rest assured that Respondents would not be pleased if Congress arrogated to itself the right to specifically regulate each individual Web site operator's manner of doing business. Presumably, Respondents would be even more incensed if Congress were to adopt a nationwide licensing scheme. By

virtue of this case, Respondents have completely rebuked the notion of a national standard.

It is simply inconsistent for Respondents to complain of the fact that Congress has left them to their own devices in terms of insuring that they meet their civic obligation to protect children via respect for community standards. See, 47 U.S.C. § 231(c)(1)(C). First Amendment freedom on the Internet cannot be translated to mean that every Web site operator has free license to do whatever they wish. Freedom is not always an easy discipline and the Internet should not be used as a salvo for those who would shirk their duty to society.

Proper regulation can take place even if the initial impetus of the regulation has something to do with the content of the material sought to be distributed. Even with respect to content-based restrictions, this Court in *Ginsberg* restated the conclusion that, "We do not demand of legislatures 'scientifically certain criteria of legislation.' *Noble Bank v. Haskell*, 219 U.S. 104, 110." Accord, *Renton* at 475 U.S. 51 (as to content-neutral restrictions). With respect to community standards, it makes little sense to suggest that the same scientific 'gap-filler' used in *Renton* cannot be used to bridge the void between technology and community standards. It is simply unreasonable for Respondents to assume that a perfect model of First Amendment jurisprudence will be developed which can supplant the power vested in Congress and, thereby, deprive it of the ability to replace missing slats in the bridge between individual communities and the wild frontier of the Internet.

Lest America's children fall between the slats into a stormy sea of obscenity, pornography and violations of parental rights, it seems that Congress has served well in its capacity as a responsible guardian of rights and protector of America's children. As the source all building 'materials' for the omnipresent trestle of individual rights, the Constitution prevents this Court from acting as a demolition team where

Congress has acted responsibly. *See generally, Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803).

CONCLUSION

For the foregoing reasons, the Honorable Court should reverse the judgment of the Third Circuit Court of Appeals herein.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
JUL 27 2001
CLERK

No. 00-1293

In The Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*,

SENATOR JOHN S. MCCAIN
REPRESENTATIVE MICHAEL G. OXLEY
REPRESENTATIVE JAMES C. GREENWOOD,
REPRESENTATIVE THOMAS J. BLILEY, JR. (RET.),

IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Curiae are the principal Congressional sponsors and authors of the *Child Online Protection Act* of 1998 (COPA). Senator John S. McCain was the Chairman of the Senate Committee on Commerce and Representative Tom Bliley (ret.) was the Chairman of the House Committee on Commerce, which authored the Committee REPORT that accompanied H.R. 3783 (H. REPT. No. 105-775). Representatives Michael G. Oxley and James C. Greenwood were the primary sponsors in the House. (Senator Dan Coats (ret.) was the original sponsor of the Act and was an *amicus* below, but has been nominated to be an Ambassador of the United States and cannot join in this brief.) These gentlemen filed a BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* in both the District Court and the Third Circuit below to present their views on the intent of Congress concerning the meaning and applicability of COPA. Your *amici curiae* submit that the decisions below are contrary to this Court's precedent and the legislative intent of the Congress and submit arguments not presented by the parties below and which may not be submitted to this Court. [1]

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Bruce A. Taylor of the National Law Center for Children and Families ("NLC") and no part of the brief was authored by any attorney for a party. No person or entity other than the NLC, *amici curiae*, or their counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The Court of Appeals committed clear error in its refusal to narrowly construe the *Child Online Protection Act*'s definition of "Harmful To Minors," 47 U.S.C. § 231 (e)(6), within a constitutionally valid scope and lend the necessary authoritative construction intended by Congress as a limitation on the test for what is "Obscene For Minors" to a constitutionally valid, non-geographic "adult" *age* community standard, rather than an unconstitutionally territorial *geographic* community standard. *ACLU v. Reno*, 217 F.3d 162, 173-78 (3d Cir. 2000), *reh. denied* (2000).

Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from First Amendment protected speech depends on the medium. *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

The Congressional intent expressed in its REPORT of the House Committee on Commerce, H. REPT. No. 105-775, at 28 (1998) (House REPORT to accompany H.R. 3783, 105th Cong., 2d Sess.), was that COPA was to be adapted to the World Wide Web by using a "new" standard of what the American adult-age community as a whole would find prurient and offensive for minors in the probable recipient age group. The Third Circuit refused to adopt this Congressionally intended customization of the "harmful to minors" test and, by such refusal, interpreted the Act in an unconstitutional fashion. *ACLU*, 217 F.3d at 178. By doing so, that Court, as had the District Court below, failed in its duty to properly construe this federal statute so as to save it for valid application within constitutional boundaries.

For these reasons, this Court should reverse the decision of the Court of Appeals, and remand the cause to the Third Circuit for a narrowing authoritative construction to guide the District Court in the trial on the merits.

ARGUMENT

I. CONGRESS CREATED A NON-GEOGRAPHIC, AMERICAN ADULT AGE STANDARD FOR COPA THAT AVOIDS THE PERCEIVED OVERBREADTH IMPOSED BY THE THIRD CIRCUIT BELOW IN ITS REFUSAL SO TO CONSTRUE THE STATUTE AND ITS MISAPPLICATION OF TERRITORIAL COMMUNITY STANDARDS

These Congressional *amici* submit that this Court should first read the House Committee REPORT that accompanied this Act, which sets out the legislative basis and intent of COPA that should have guided the parties and courts below in avoiding any unconstitutional applications of the Act and allowing COPA to be validly applied to the free samples of pornographic "teaser" pictures displayed to children and adults alike on the front pages of commercial sites on the World Wide Web that regularly sell hard and soft core pornography that is obscene for minors under the modified test for what is "Harmful To Minors" in this Act.

In particular, the Third Circuit below upheld the trial court's preliminary injunction on the sole ground that COPA must use a geographic community standard to determine what is "Harmful To Minors" and then held that such geographic standards would be unconstitutional if applied to the Web and, therefore, COPA was likely unconstitutional, at least as viewed with this perspective. *ACLU, supra*, 217 F.3d at 178. The Court of Appeals refused to adopt the intended limitation provided by Congress to avoid that very constitutional problem. Specifically, the Act created a new *age* standard for COPA, which reflects the views of the American adult community as a whole, that differs from either the geographic or non-specific community standards that have been applied to adult obscenity in land-based

transportation circumstances. As stated in the House REPORT at 28:

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

Congress intended COPA to be a narrow statute that would not reach protected speech; the Plaintiffs and courts below interpreted the Act to be so overbroad that it would. Properly construed and interpreted, COPA could and should have been declared inapplicable to the instant Plaintiffs and they would have been subject to none of the perceived prior restraints presumed in the trial court's Findings of Fact. The law could thus have been upheld for proper application to the Web sites already selling pornography that is within the valid scope of what is obscene or Harmful To Minors under COPA, as to which no unconstitutionality exists. As discussed in Part II below, the courts below did not *find* COPA unconstitutional, they *made* it unconstitutional.

COPA adopted the non-geographic, age-based, adult community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test.

This is a reflection of the power of legislatures to do so, as recognized by this Court in upholding non-specific "community standard" instructions in state and federal courts. *See Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), *Hamling v. United States*, 418 U.S. 87, 101-07 (1974), even though trials could occur in various federal districts, as they could under various state laws. It was in *Jenkins*, at 157, that the Court held that courts and juries need not apply any hypothetical geographic standards whatsoever. Congress,

likewise, narrowed COPA to suit the Web by giving its legislative intent to apply a generic "adult" standard.

In this Court's *Erznoznik* and *Pico* cases, and in the Harmful To Minors cases decided by the other federal and state courts discussed in Part III below, the courts have already held that minors may receive sexual materials that are not "harmful" or "obscene for minors" in the legal sense. Sexual information and sexually explicit materials that are not factually and legally Harmful To Minors and Obscene For Minors under the *Millerized-Ginsberg* test may not be proscribed to minors simply because "someone" disapproves of the message, viewpoint, or orientation of the materials.

Like obscenity generally, the terms "harmful to minors" or "obscene for minors" are legal terms of art, subject to the constitutional procedures of the courts, and protected against unconstitutionally overbroad applications or vague interpretations. As stated in *Hamling v. United States*, 418 U.S. 87, 118 (1974):

> The definition of obscenity, however, is not a question of fact, but one of law; the word "obscene," as used in ...[federal law], is not merely a generic or descriptive term, but a legal term of art. ... The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice ....

So it is with the term "harmful to minors" as adopted into federal law by COPA. So it is also that the federal courts are bound to apply this Act in accordance with First Amendment principles and thus protect even those who suffer unfounded fears instilled by propaganda, advocacy, or lack of trust or knowledge in the law. The courts should not accept such hypothetical exaggerations, because laws are not to be so impermissibly applied or expanded, as the Court noted in *New York v. Ferber*, 458 U.S. 747, at 773 (1982).

The body of law and the diligence of the courts are expected to protect and apply these required legal principles, despite the lack of knowledge or confidence that some individuals may have in the law enforcement or judicial system.

The Court of Appeals focused solely on the "'contemporary community standards' aspect of COPA" in "affirming the District Court's ruling on a ground other than that emphasized by the District Court". *ACLU*, 217 F.3d at 174, n. 19. As stated by the Court of Appeals, at 173-74:

> We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.

Although first saying the issue was virtually ignored, the Circuit court later referred to the arguments on this issue by the Government and the Congressional *amici* in their BRIEF OF MEMBERS OF CONGRESS (quoting the BRIEF's statement at p. 16 that: "COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful to Minors test."). *Id.* The Court of Appeals then misread this Court's allowance of local determinations of obscenity in *Miller v. California*, 413 U.S. 15 (1973), as requiring such local geographic standards.

That opinion failed to consider this Court's decision the next year, in *Jenkins v. Georgia*, 418 U.S. at 157 ("We

also agree with ... instructions directing jurors to apply 'community standards' without specifying what 'community.'"), that courts and juries may apply non-specific "community standards" and need not apply any hypothetical geographic standards in making factual findings through the "community" viewpoint of an "average person" (as cited in the Congressional BRIEF at pp. 16-17).

By finding itself hand-cuffed to geographic standards under *Miller*, and presuming that geographic standards would be inherently improper for Web determinations of what would be obscene for minors, the Third Circuit declared that COPA was, therefore, inherently unconstitutional and rejected Congressional intent to apply the Committee REPORT's statutory directive to create a "new harmful to minors definition" that was "crafted in a way to respond to the Supreme Court's concerns" in *Reno v. ACLU*, 521 U.S. 844 (1997). *See* H. REPT. No. 105-775, at 13.

Congress specifically explained its intent to apply a medium-specific, non-geographic standard to the first two prongs of the test for what is "obscene for minors" or "harmful to minors" and the courts below failed in their duty to follow the requirements for federal court review of federal statutes expressed in *Ferber*, 458 U.S. at 769, n. 24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (context is all important, including the medium involved).

This issue was discussed at pp. 16-17 of the BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* that was filed with the Third Circuit:

> This Court, like the Supreme Court in *Ferber*, should correct the assumption that federal courts can "widen the possibly invalid reach of the statute by

giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the COMMITTEE REPORT.

Courts recognize the need to follow these principles in applying the HTM test to pornographic treatments, rather than to ideas or messages in controversial works, as in the school cases: *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test. As stated in the COMMITTEE REPORT at 28:

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

Properly construed and applied, HTM laws apply to pornographic materials, not serious or controversial treatments of sex. Serious sex education, AIDS or STD information, disease prevention, sexual politics, news accounts of sexual offenses or legal issues, and political or social treatments of sexual issues cannot be obscene or Harmful To Minors because they have serious literary, artistic, political, or scientific value for minors.[2]

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[2] *I.e.*, the "Starr Report" released by Congress to the press and World Wide Web, as a public document of political significance, would **not** be affected by COPA (or existing state HTM laws),

The established test for Harmful To Minors only affects a minor's access to that which lacks serious literary, artistic, political, or scientific value for the intended and probable age group of the minors to which it is available.

Furthermore, because of limitations in the statutory elements, secondary transmissions ("hot links" to offending sites) would not, standing alone, violate the statute, even if commercial. House REPORT at 25. COPA requires that an offender be the one who knows the character of the matter and then knowingly "makes any communication for commercial purposes...that includes any material that is harmful to minors" under Section 231 (a). The law further limits the maker of the HTM/OFM communication to one who is "engaged in the business" of trying to profit from "such" harmful communications "as a regular course of such person's trade or business" under Section 231 (e)(2). COPA, therefore, only applies to commercial WWW sites that can be proven by the Government to regularly and knowingly sell or attempt to profit from pornographic materials that are obscene or Harmful To Minors. COPA does not apply to private, governmental, news, non-profit, or other sites that cannot be shown to regularly market obscene or HTM pornography. COPA is a valid proscription against a definitive type of pornography, but it would not, as a matter

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since the "Starr Report" is neither "obscene" for adults nor Obscene For Minors. It's not "pandered" to prurient interests and does not describe sexual conduct in a "patently offensive" way. Its grand jury descriptions are clinically graphic, not salaciously lascivious or pruriently pornographic when judged by the "average person" of the law. Finally, such governmental and news information has inherently serious political value, as a matter of law, for everyone, everywhere, any time, minors as well as adults, here and abroad. The NYTimes.com and Amazon.com are free to reprint or sell it at will, as everyone knows, and can post it online without any restrictions, as Congress did.

of law, affect the release nor the commercial or public re-distribution of serious works.

A most important case in the history of harmful to minors laws since *Ginsberg*, especially as a lesson in the need for properly construing such a law as COPA, is *Commonwealth of Virginia v. American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988), which clarified and limited the scope of such laws at the request of this Court. The federal courts had found Virginia's display law overbroad and vague, based on presumptions about what would be HTM. *American Booksellers Ass'n v. Strobel*, 617 F.Supp. 699 (E.D. Va. 1985), *aff'd, sub nom American Booksellers v. Com. of Va.*, 792 F.2d 1261 (4th Cir. 1986), amended opinion, 802 F.2d 691 (4th Cir. 1986). Jurisdiction was noted on the appeal, but this Court then proffered two certified questions to the Supreme Court of Virginia, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988):

1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 ..., properly construed, encompass any of the books introduced as plaintiff's exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?

2. What meaning is to be given to the provision of Virginia Code § 18.2-391(a) ... making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

The Virginia Supreme Court replied, 372 S.E.2d at 625: "*The first certified question is answered in the negative. The second certified question is answered in the affirmative.*"

The Virginia Supreme Court interpreted Virginia's "harmful to juveniles" display law in light of *Miller, Ginsberg, Pope, etc.*, as applicable only to "explicit sexual content," "pornographic," or "borderline obscenity" and found that sixteen exhibits would not be "harmful to juveniles" because they contained serious literary, artistic, political, or scientific value "for a legitimate minority of older, normal adolescents". As so construed, Virginia's law was then upheld on remand, *sub nom American Booksellers Ass'n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989).

It is clear, these *amici* submit, that the concerns of the U.S. Supreme Court were in (1) whether the reach of such harmful to minors laws as upheld in *Ginsberg* were still limited to pornographic "adult" materials, rather than to serious or redeeming, if frank, sexual information or treatments; (2) whether the "variable obscenity standard" was variable, not only for minors as a class, but variable as to age groups of minors within that class; and (3) whether possible restrictions on marketing or display of such "harmful" pornography that is "obscene as to minors" are reasonably related to safeguarding children from exposure to such unprotected materials (as to them) by various methods available to businesses in modern commerce.

Just as the highest federal Court asked the highest state Court for its authoritative interpretation and construction of the law under consideration, your Congressional *amici* similarly submit that the courts below, with a corresponding power and duty to interpret and construe this federal law, should have authoritatively read the Child Online Protection Act so as to protect the legitimate rights of those to whom it cannot be applied and to

uphold it as to all others to whom it is facially applicable and who are not challenging the act or who may face the Act only on a fact specific case-by-case basis in the future.

The guidance of historical precedent and limitations recognized in the House REPORT and HEARINGS, should be adopted by this Court and thus avoid any real or substantial overbreadth or vagueness claimed by the Plaintiffs and their *amici* in this matter. This Court would thus guide the lower courts on remand to protect the rights of those before it and all those who are not before it, since both groups will benefit from the limiting focus and clarifying gloss put on the law by an authoritative declaratory judgment in this case.

II. THE COURTS BELOW ERRED IN REFUSING TO NARROWLY CONSTRUE THE ACT SO AS TO BE CONSTITUTIONAL AND, INSTEAD, INTERPRETED THE LAW IN AN OVERBROAD FASHION SO AS TO BE UNCONSTITUTIONAL

The Court of Appeals below made a fundamental error of statutory review in refusing to authoritatively construe the definition of "harmful to minors" in COPA as specified and intended by Congress. *ACLU v. Reno, supra*, 217 F.3d at 178. Doing so would have avoided the potential for overbreadth the courts below presumed if geographic community standards were applied to Web traffic under COPA. The Third Circuit assumed that geographic standards would lead to unconstitutional applications and then noted that Congress intended a non-geographic standard to avoid this, but refused to adopt that saving construction because the court below was of the opinion that "community standards have always been interpreted as a geographic standard without uniformity" and, therefore, declared the test for what is "harmful to minors" to be unconstitutional for the Web. *Id.*

In this way, the courts below did not find COPA unconstitutional, they made it unconstitutional.

Though federal courts cannot authoritatively construe a state statute and, instead, declare them wholly or partially valid, invalid, or severable, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-05 (1985), the rule is appositive for federal statutes, since federal courts are bound to interpret federal laws in a constitutional fashion so as to protect legitimate rights. COPA is readily susceptible to such authoritative constitutional construction. The rule was stated in *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982):

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.

It was recognized in *Ferber, supra*, that First Amendment challenges may be heard to a law that is facially overbroad by one to whom the statute could have been validly applied. The opposite is also true. The courts should not strike a statute on its face as to those to whom it has a legitimate reach when the court can protect the rights of those before it by limiting its reach. By declaring it inapplicable to those to whom it cannot be applied, such narrowing construction will exclude and guide those protected speakers. *Ferber*, at 766-74, discussed the "substantial overbreadth" doctrine and reiterated that facial invalidity is a drastic and narrow exception that must be "carefully tied to the circumstances in which facial invalidation of a statute is truly warranted" and is "strong medicine ... only as a last resort." Plaintiffs were never required to offer proof of any real or substantial overbreadth claimed for this Act and this Court should correct the lower courts' presumed overbreadth by narrowly construing COPA

so as to prevent and forbid any such unconstitutional applications. As noted and held in *Ferber*, at 773-74:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic, would fall prey to the statute. ...Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and ... whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." [Emphasis added.]

In the instant case, COPA is explicitly directed at the pornographic core of what is obscene or harmful to minors, not at literary, artistic, political, or scientific treatments of sex and not at materials that are not pandered to prurient interests. In this case, the ACLU argued that the HTM test could be expanded to reach much of the speech traditionally protected from prosecution under existing "harmful to minors" laws, without any evidence, factual basis, or even examples to substantiate such fears of expansive application.

The District Court did not find anything in the record to be Harmful To Minors as defined in COPA, did not find any image, text, or information on any Plaintiff's Website to be subject to COPA, and did not find that COPA would apply to any identifiable utterance of protected speech

presented as evidence in the record. The ACLU Plaintiffs offered no example of any HTM materials in their possession, they identified none on anyone else's sites, and denied that any of them had any pornography, much less pornography that could be "obscene for minors." The basis for the Findings of Fact were mere fears that "some" information of a sexual nature could be offensive to "someone" in another state or prosecuted by "some" prosecutor somewhere.[3]

Especially on the basis of this legally inaccurate and speculative testimony, *amici* submit that this is not a proper record upon which the federal courts should be asked to strike down a federal statute.

This Court, like the Court in *Ferber*, should correct the assumption that federal courts can hypothetically "widen the possibly invalid reach of the statute by giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the House REPORT. Courts are obligated to recognize the need to follow these principles in applying the HTM test to pornographic treatments that are "Obscene For Minors",

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[3] Question: "In your opinion, how would COPA impact the ability of Internet users to browse on the Web for information that is prohibited by COPA?" Answer by Prof. Hoffman: "... I think it would have negative consequences for the flow experience...." Transcript of Jan. 20, 1999, at 75. *See also* Testimony of Mr. Barr for CNET, that he thought COPA would ban a news article about a porn convention, prevent asking a woman's "bra size" or discussing "safe sex on-line". (Tr. Jan. 21 at 48-49, 63-65); Testimony of Mr. Tepper for Sexual Health Network, "Yes, I do" when asked "Do you fear that some people will not believe your site has value to minors?" (Tr. Jan. 21 at 117); Testimony of Mr. Rielly for PlanetOut, as to the "basis of your fear?", said "many people would find just being gay at all, harmful to minors in their definition of it". (Tr. Jan. 21 at 158).

rather than to ideas or messages in controversial works, as in the school cases, such as *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); and *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

III. COPA Is An Explicitly Narrow Statute That Applies Only To Pornography That Is Obscene For Minors Or Obscene For Adults And Only For Commercial Sites That Sell Such Pornography On The World Wide Web

Your Congressional *amici* maintain that the *Child Online Protection Act* is a constitutionally valid federal adoption of the traditional protections for minors that have existed for over thirty years in state Harmful To Minors ("HTM") laws. This statute, 47 U.S.C. § 231,[4] would protect the overwhelming majority of minor children in America from the instant and unrestricted access to the free pornographic "teaser" pictures now openly available on the front pages of tens of thousands of commercial porn Websites that sell hard-core and soft-core pornography on the World Wide Web. In light of the dire situation existing since the CDA's indecency provisions were invalidated in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329 (1997), Congress found that COPA would be effective and reasonable in dealing with this tragic feature of the Web. As stated in the House REPORT at 16:

> In light of the *Reno* decision, the Committee has thoughtfully and thoroughly considered a number of ways to help protect children from being exposed

[4] Copy in Appendix hereto.

> to harmful material. Each proposal has merit, but the Committee concludes that H.R. 3873 is currently the most effective, yet least restrictive approach that should be taken given the current state of technology.

Commercial pornography is big business and a major presence on the Web. Tens of thousands of "adult" sites sell pornography. House REPORT at 7. Most openly allow children, as well as adults, to view hard-core and soft-core porn pictures by simply clicking on any link to a pornography company's Web page, even when searching for innocent material such as "teen", "boy", "girl", "toy", "pet", *etc.* *See* House REPORT at 10, citing Testimony of National Law Center for Children and Families. By 1998, "almost 70 percent of the traffic on the Web is adult-oriented material" and exposure to pornography is just as unintentional as it is intended, especially to children. House REPORT at 10. The Committee found that exposing children to pornographic HTM/OFM material does cause harm to children and is a dangerous influence in their development. House REPORT at 11.[5] Other testimony and evidence was provided to the

[5] *I.e.*, the effect on children of flashes of pornographic teaser images is profound: as neurologist Dr. Gary Lynch stated, "an event which lasts half a second within five to ten minutes has produced a structural change that is in some ways as profound as the structural changes one sees in [brain} damage...[and] can...leave a trace that will last for years"; in a study conducted for the Office of Juvenile Justice and Delinquency Prevention of the U.S. Dept. of Justice, Dr. Judith Reisman chronicled the practices of sexualizing children in pornography in *Images of Children, Crime and Violence in Playboy, Penthouse, and Hustler*, www.DrJudithReisman.org; Reisman, *"SoftPorn" Plays Hardball: Its Tragic Effects on Women, Children & the Family* (Huntington House Pub. 1991); and as psychiatrist Dr. Richard Restak noted in

Committee at its HEARING ON LEGISLATIVE PROPOSALS TO PROTECT CHILDREN FROM INAPPROPRIATE MATERIALS ON THE INTERNET, House Commerce Committee (September 11, 1998), and the House REPORT chronicles this and other findings about the serious problem of freely available pornography and the free "teaser" samples of porn pictures that can be viewed, downloaded, and printed by children. House REPORT at 6-12, 16, 20-21.[6]

COPA was specifically designed to require such commercial porn sellers to make a good faith effort, by credit card, credit card number[7], adult access number, *etc.*, to protect visiting children or teenagers from seeing graphic sex pictures on front pages of porn Websites. House REPORT at 6, 11-12. Such sites already take credit cards to allow customers to view thousands of other pornographic pictures, so they have no technological or other reasonable excuse for putting the credit card page ahead of the "teaser" pictures. If they ask for a credit card number or adult PIN, or any other technical device such as a digital signature or an ISP's or a

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his book, *The Mind* (Bantam Books, 1988), p. 283, "Inhibition rather than excitation is the hallmark of the healthy brain."

[6] The District Court noted only the mere existence of "sexually explicit material" on the Web and failed to make findings or discuss Congressional findings of the extent of the problem. *ACLU v. Reno*, 31 F.Supp.2d 473, 484 (E.D. Pa. 1999).

[7] *Amici*'s briefs below discussed the "Luhn Check Algorithm" as a § 231(c)(1)(C) defense technique to check credit card numbers and screen out minors. *Amici* submit that the trial court below could have considered adequate alternatives for compliance, including a virtually free compliance method like the "Luhn Check" (which simply runs a credit card number through a mathematical formula to reject phony numbers, such as a child may try to pass, without checking any bank databases or charging the customer at all) and submit that this Court or the Court of Appeals should direct the District Court to do so on remand.

school's age identifying signal code, then they are not liable under COPA, even if an "enterprising and disobedient" minor does steal his mother's credit card, his father's digital signature, or his older brother's adult PIN number. The Website did all the Act could ask to screen out children and that, alone, "would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages" and porn-images, as recognized by this Court as to the FCC's similar dial-porn protections in *Sable Communications of Cal. v. FCC*, 429 U.S. 115, 130 (1989).

The legislative intent of this Act, stated in the House REPORT, clearly establishes that COPA was intentionally limited in scope to deal only with this problem as it exists on the World Wide Web and only for commercial sellers of pornography that is "obscene" (even for adults) or "harmful to minors" (*i.e.*, "obscene for minors"). It is equally clear from the House REPORT that the Act was not intended to apply to serious or merely controversial treatments of sex or sexual issues that form the complaints of Plaintiffs below.[8]

These Members of Congress respectfully submit that the courts below erred grievously in failing to interpret COPA as narrowly as intended. The lower courts should have excluded COPA's application to Plaintiffs' materials as outside the scope of what is "harmful to minors," as this

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[8] It can't be ignored that the District Court did not find <u>any</u> Plaintiff's material "harmful to minors" or even potentially so. The evidence was that none was considered "HTM," but that Plaintiffs "feared" COPA because they had some material "sexual in nature". 31 F.Supp.2d at 480, 484-86. Importantly, the Government conceded COPA's "definition of 'harmful to minors' material does not apply to any of the material on the plaintiffs' Web sites, and that the statute only targets commercial pornographers, those who distribute harmful to minors material 'as a regular course' of their business." 31 F.Supp.2d at 479.

Court and other federal and state courts have construed that legal test for what is "Obscene For Minors". House REPORT at 12-13.

The technical capability of commercial WWW pornographers to use credit cards and PIN codes was recognized in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2349 (1997), and by the District Court below, 31 F.Supp.2d at 488-91. Congress adopted this Court's pronouncements to deal with this narrow part of the problem of online pornography. House REPORT at 5, 11-13, 26. COPA applies only to the World Wide Web and excludes all other Internet, Usenet, email, BBS, chat, and online services. The Act applies only to commercial sellers of HTM/OFM pornography and excludes all non-commercial, non-profit, educational, governmental, and private communications. House REPORT at 12-14. Finally, COPA employs existing, constitutionally valid definitions of "obscene" and "harmful to minors," limiting its reach to pornography that is not protected speech for juveniles to receive and unprotected when provided or displayed to juveniles by adults. House REPORT at 12-13, 28. Therefore, COPA is an intentionally narrow focus on a "least restrictive means" to control the unrestricted display to minors of legally "harmful" pornographic materials that are Obscene For Minors on pornsite Web pages. House REPORT at 12, 16, 26.

COPA is limited solely to regulating the manner of displaying adult pornography for sale on the Web. COPA does not prohibit adults from obtaining HTM pornography online. COPA requires commercial Websites that are regularly "engaged in the business"[9] of trying to make money from selling HTM/OFM pornography to have visitors

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[9] As that term of art applies to obscenity law, 18 U.S.C. § 1466, as construed and applied in *U.S. v. Skinner*, 25 F.3d 1314, 1318-19 (6th Cir. 1994). House REPORT at 27.

identified as adults before sampling adult materials. Sites are protected by defenses in Section 231(c) when attempting to restrict access "by any other reasonable measures that are feasible under available technology". COPA acts like existing HTM display laws that require vendors of "adult" pornography to put HTM materials out of minors' reach in commercial and public places. Over the past four decades in every state, magazine retailers, video outlets, and "adult" pornshops, have complied with state HTM laws, yet continued to sell such materials to adults while restricting access and display from minors.

COPA separately incorporates both the "*Miller*" test for what is "obscene" for adults, as well as a Web modified legal definition of "harmful to minors", thus making the Act applicable to hard-core pornography that is obscene[10] and soft-core pornography that is "Harmful To Minors" and Obscene For Minors even if not obscene for adults.[11] The HTM test was upheld over thirty years ago as a "variable obscenity" test for pornographic materials that are unprotected for minors in *Ginsberg v. New York*, 390 U.S. 629 (1968), and is now known as the "*Millerized-Ginsberg* Test." *See* House REPORT at 12-13. The obscenity test derives from *Miller v. California*, 413 U.S. 15, at 24-25 (1973), *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977) (the "average person, applying contemporary community standards" would also "judge" patent offensiveness in prong two), and *Pope v. Illinois*, 481 U.S.

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[10] *See also* Taylor, "Hard-Core Pornography: A Proposal For A *Per Se* Rule," 21 U. MICH. J.L. REF. 255 (1988)

[11] The definition of "Material that is Harmful to Minors" is set out in 47 U.S.C. § 231 (e)(6) and "means any communication…that is obscene or that—(A)…(B)…and (C) [the "*Millerized-Ginsberg* Test" for what is "Obscene For Minors" or "Harmful To Minors", as defined]". (Emphasis added.) (Copy in Appendix.)

497, at 500-01 (1987) ("a reasonable person" would "judge" serious value in prong three, not by "community" standards). In the past thirty years, there has been virtually no need for enforcement of state Harmful To Minors laws, due to universal compliance with HTM sale and display laws by businesses across the Nation. However, obscenity prosecutions and civil challenges to HTM laws provide guidance and authoritative construction precedent for understanding the scope of COPA. It is worth noting that some "men's sophisticate" magazines have been found "obscene" as a matter of law, even for adults, by federal and state courts: *See Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *Penthouse v. Webb*, 594 F.Supp. 1186 (N.D. Ga. 1984); *City of Urbana v. Downing*, 539 N.E.2d 140, 149-50 (Ohio, 1989); *State v. Flynt*, 264 S.E.2d 669, 679 (Ga. App. 1980), *cert. denied*, 449 U.S. 888 (1980); *City of Belleville v. Morgan*, 376 N.E.2d 704 (Ill. App. 1978); *State of Ohio, City of Cleveland v. Hustler Magazine, Inc.*, No. 76-959230, Rec. vol. 330, pp. 545-55 (Ohio Common Pleas, 1976).

Such "men's sophisticate" magazines are well-known and universally treated in the magazine and print medium as "harmful to minors." Consequently, this type of pornography is not displayed to minors in print form and is the type of pornography that would be restricted from open commercial display to minors on the Web under COPA. No court should find that these long-existing HTM laws are misunderstood or unreasonable in the print medium and film industry. This system works in all other media and commercial settings in this Country and COPA would do likewise for commercial porn sellers on the WWWeb.

Though HTM laws have heretofore been state statutes and city ordinances, the standard is familiar to the federal courts, which have routinely upheld such laws. See, for example: *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997) (Calif. statute

requiring adult tokens for HTM soft-porn vending machines); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *American Booksellers Ass'n v. Commonwealth of Virginia*, 882 F.2d 125 (4th Cir. 1989), on remand, 488 U.S. 905 (1988), upholding HTM law as construed on certified questions in *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988); *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). *See* House REPORT at 13.

During the last four decades, the Harmful to Minors test for what is "Obscene For Minors" has been judicially, publicly, and commercially limited to soft-core pornography that is as unprotected for minors as hard-core pornography is obscene and unprotected even for consenting adults.

COPA's definition of Harmful To Minors, 47 U.S.C. § 231 (e)(6), includes that which is "obscene" for adults, as well as that which is "Obscene For Minors" under the variable obscenity test for what is unprotected for minors.

In adopting a narrowed version of the established test for Harmful To Minors, COPA should be interpreted and construed to narrow its reach to materials that are intentionally pornographic and inappropriate for minor children of the intended and probable age groups to which it is exhibited. As stated in the House REPORT at 28:

> The Committee also notes that the "harmful to minors" standard has been tested and refined for thirty years to limit its reach to materials that are clearly pornographic and inappropriate for minor children of the age groups to which it is directed. Cases such as *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Board of Education v. Pico*, 457 U.S. 853 (1982), prevent the traditional "harmful to minors" test from being extended to entertainment, library, or news materials that merely contain nudity

> or sexual information, regardless of how controversial they may be for their political or sexual viewpoints. [Emphasis added.]

Erznoznik and *Pico* also prevent viewpoint discrimination and suppression of ideas, which are not permitted under the HTM/OFM test. Minors are entitled to sexual information that has serious value for their age groups, even if "someone" might find them offensive or prurient. These cases are binding on all courts with respect to the scope and applicability of state and federal HTM laws, including COPA. They protect Plaintiffs and the public in rejecting unfounded, hypothetical scare tactics of those who would have them believe that such protected speech may be in jeopardy. *Erznoznik*, 422 U.S. at 213, held that "all nudity cannot be deemed obscene even as to minors" and cited *Cohen v. California*, 403 U.S. 15, 20 (1971) ("such expression must be, in some significant way, erotic"). Such statements were repeated in later cases such as *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") and *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("that society may find speech offensive is not a sufficient reason for suppressing it"). *Erznoznik*, 422 U.S. at 213, held an ordinance overbroad because it was "not directed against sexually explicit nudity, nor is it otherwise limited.... Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." [Emphasis added.]

Most reported decisions on the HTM/OFM test are federal court reviews of state harmful to minors display or sales laws and do not involve factual findings as to the

"harmful to minors" nature *vel non* of any particular materials. In a few major decisions, however, there were findings as to certain trial exhibits as to what could be within the reach of those laws and authoritative constructions were offered to provide guidance on the scope of such laws.

American Booksellers v. Webb, supra, 919 F.2d at 1503-05, upholding Georgia's HTM display law and "*Millerized-Ginsberg* Test" and finding that a defendant's exhibit would be subject to the law, stating in footnote 22:

> This is not to say that the statute covers only material already subject to Georgia's general obscenity statute.... For example, Defendant's Exhibit 1, *Human Digest* (June 1984), found in a convenience store with no restrictions on in-store access by minors, would be 'harmful to minors' and thus subject to section 16-12-103's bans on sales to minors and display. The cover refers to several articles within that are written from the juvenile perspective: "'Why My Mom Loves Oral Sex!'"; "'I Made X-Rated Videos for Dad!'"; "'Sex Slave Sis!'"; and "'My Anal Aunt!'".

Upper Midwest Booksellers v. City of Minneapolis, 602 F.Supp. 1361, at 1369 (D. Minn. 1985), upholding city HTM display ordinance and declaring that it was lawfully applicable to "sexually explicit materials" that are "harmful to minors" and stating:

> A child who walks into a store which openly displays material with sexually explicit covers may be harmed simply by viewing those covers.

In affirming that District Court opinion, the Eighth Circuit Court of Appeals in *Upper Midwest Booksellers v. City of Minneapolis, supra*, 780 F.2d at 1395, recognized the limitations and construction of such HTM laws in upholding

the display provision as a valid time, place, and manner protection for minors. The ordinance did not prohibit adults from obtaining "adult" materials, even though adults must comply with the "incidental effect of the permissible regulation" by purchase, requesting of a copy from a clerk, or perusal in "adults only bookstores or in segregated sections of ordinary retail establishments".

In the Virginia Supreme Court's opinion on certified questions from this Court, 484 U.S. 383, the State Court held that each of the 16 works[12] "feared" to be threatened by Virginia's HTM law were not legally "harmful to minors," even though the federal courts had presumed the books were in jeopardy of the law when interpreted in an overly broad fashion. *Commonwealth v. American Booksellers, supra*, 372 S.E.2d at 622:

> The 16 books in question run the gamut, as the Supreme Court aptly put it, from classic literature to pot-boiler novels. Having examined them all, we conclude that although they vary widely in merit, none of them lacks "serious literary, artistic, political or scientific value" for a legitimate minority of older, normal adolescents. It would serve no purpose to review the books in detail. Because none of them meets the third prong of the tripartite test, we hold that none of the books is "harmful to juveniles" within the meaning of [Virginia] Code §§ 18.2-390 and 391.

This recognition that the HTM/OFM test must consider serious value for the age group to which it is directed was an essential and principle holding of the

[12] *i.e.*, "Where Do Babies Come From?," "Ulysses," "The New Our Bodies, Ourselves," "Am I Normal?," "Witches of Eastwick." 372 S.E.2d at 622.

Supreme Court of Virginia, and is another narrowing limitation on COPA. *See also American Booksellers v. Webb, supra*, 919 F.2d at 1504-06, and House REPORT at 28.

These precedents form the basis for COPA's constitutionally valid reach to pornography that is not protected in its display to minors, by those commercial pornsites that can and should comply.

The District Court's interpretation and conclusions of law in this case, 31 F.Supp.2d at 481, 497, are beyond the clear bounds of the binding precedent applicable to COPA's HTM/OFM test and the Third Circuit, 217 F.3d at 173-78, extended the error further in affirming on a narrower, but equally erroneous, ground by misapplying community standards.

The legislative history is clear that the established decisions cited above and in the House Committee REPORT were adopted into COPA[13] and the lower courts erred in failing to so construe the Act. Those decisions mandate and should have guided the courts below in an authoritative construction of this new federal law in such a constitutional manner. This Court should now do so and enter the judgment that was warranted below.

CONCLUSION

Your *amici* submit that the Congressional Committee Report was right and the Third Circuit was wrong on this critical issue and that this Court should reverse this pretrial

[13] House REPORT at 12-13, 27-28. *See also* floor statement by Senator Coats that COPA is intentionally limited by these guiding precedents and that HTM material is the type of sexually explicit pornography that is clearly obscene as to minors and not merely offensive or controversial. Cong. Rec.- Senate, S.12146-54 (daily ed., Nov. 8, 1997).

judgment and correct that error for the proper guidance of the trial court.

The error below:

The Court of Appeals below, at 178, failed to follow established First Amendment obscenity jurisprudence in its conclusions that (1) geographic standards would be inherently unconstitutional in "cyberspace," that (2) obscenity and harmful to minors laws must be inherently applied by geographic standards, and that (3) COPA thus could not be narrowed to avoid that perceived unconstitutionality by following the intent of Congress to customize a new Web-specific test for "harmful to minors" that employs a more uniform American adult- age based standard, rather than a geographic or territorial based viewpoint.

The correct HTM/OFM test:

When COPA is so construed, as intended in the House REPORT and sponsor's statement, the trier of fact may properly arrive at a judgment as to whether certain hard or soft core pornography is "harmful for minors" by applying the viewpoint of the average adult person, applying American adult standards with respect to what is obscene for minors, when taken as a whole, predominantly appeals to a prurient interest in nudity, sex, or excretion with respect to the probable and recipient age group of minors and whether the sexual depictions or descriptions are presented in a patently offensive way with respect to the probable and recipient age group of minors. The final prong is not judged with reference to community standards, but is determined by the more universal judgment of a reasonable person's finding as to whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value for the probable and recipient age group of minors to which it is directed or to whom the distributor knowingly displays the pornography.

The problem created for HTM and obscenity cases:

This Court should correct the fundamental error explicit in the Third Circuit's opinion for the additional reason that such an interpretation of community standards as exclusively territorial would or could be applied erroneously by federal and state courts to the application of adult obscenity laws to Internet or Web cases, despite this Court's recognition in *Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), that geographic standards are not required for testing obscenity and in *Reno v. ACLU*, at 878, n. 44, that:

> Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.

For all these reasons, the judgment of the Court of Appeals in affirming the preliminary injunction should be reversed and a narrowing authoritative construction be adopted by this Court that is binding on the lower courts in order to allow COPA to be applied in a valid and constitutional fashion as intended by the Congress.

Dated: July 27, 2001

Respectfully submitted,

Bruce A. Taylor
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APPENDIX

APPENDIX

TEXT OF OPERATIVE PROVISIONS OF COPA, THE CHILD ONLINE PROTECTION ACT

Title 47, United States Code

Section 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

(a) REQUIREMENT TO RESTRICT ACCESS.—

(1) PROHIBITED CONDUCT. –Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

* * *

(c) AFFIRMATIVE DEFENSE.—

(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

* * *

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

* * *

(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

(A) COMMERCIAL PURPOSES.—A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) ENGAGED IN THE BUSINESS.—The term `engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful

to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

* * *

(6) MATERIAL THAT IS HARMFUL TO MINORS.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) MINOR.—The term `minor' means any person under 17 years of age.

CERTIFICATE OF SERVICE

Three copies of this Brief of Members of Congress as *Amici* Curiae were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 27th day of July, 2001, addressed to:

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Supreme Court, U.S.
FILED
JUL 27 2001
CLERK

No. 00-1293

In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

in support of the *Petitioner*

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INTEREST OF AMICUS[1]

WallBuilders, Inc. is dedicated to educating the American Pubic about the proper exercise of rights under the First Amendment. In this capacity, WallBuilders, Inc. is gravely concerned that the unregulated distribution of material that is harmful to minors in not within the proper exercise of First Amendment rights and believes that COPA is a necessary safeguard on the vast frontier of the Internet.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit, in upholding the district court's granting of a preliminary injunction enjoining the enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1998) (COPA), erred in determining that COPA will likely be found unconstitutional. The Third Circuit overlooked a narrowing construction to which COPA is

[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has mad any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

readily susceptible. COPA's key phrase, "contemporary community standards," can be construed to mean the "contemporary community standards of the community of the creator of the material." This construction is allowable under canons of construction articulated by this and other courts. When so construed, the Third Circuit's concern that web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message,'" *Reno v. ACLU*, 217 F.3d 162, 177 (3d Cir. 2000) (citation omitted), vanishes.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN HOLDING THAT COPA IS NOT READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION

In *Reno v. ACLU*, 217 F.3d 162 (3d Cir. 2000), the Third Circuit Court of Appeals upheld the district court's granting of a preliminary injunction against the enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1998) (hereinafter "COPA").

Crucial to the Third Circuit's holding was its determination that the ACLU would likely prevail on the merits by showing COPA's unconstitutionality. *Reno*, 217 F.3d at 166. Crucial, in turn, to this determination was the Third Circuit's conclusion that COPA's phrase "contemporary community standards" was not readily susceptible to a narrowing construction. *Id.* at 178-180. For the reasons set forth below, Amicus respectfully believes that that conclusion is incorrect and this brief will address this one issue.

The Third Circuit rejected the government's argument that COPA's phrase "contemporary community standards" could mean an "adult community" rather than a "geographic community" as it did in *Miller v. California*, 413 U.S. 15 (1973). However, in so doing, the Third Circuit concluded that web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message.'" *Reno*, 217 F.3d at 177

(*citing Reno v. ACLU*, 521 U.S. 844, 877-78 (1997))[2]. However, the Third Circuit created a false dichotomy. Agreeing with the government's position or deciding that the contemporary community standards had to be those of the community of the recipient are not the only two choices. Under standard canons of construction for facial overbreadth challenges, there is another narrowing construction that should be adopted and which would save COPA.

II. COPA IS READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION BECAUSE THE PROPOSED CONSTRUCTION IS REASONABLE, IT IS BASED ON AN AMBIGUITY IN ONE PHRASE, AND IT DOES NOT REQUIRE THIS COURT TO DRAW ANY LINES THAT CONGRESS HAS LEFT UNDRAWN.

This Court, in *Reno II*, stated that it could construe a statute narrowly if it were readily susceptible to such a construction. 521 U.S. at 884. COPA is indeed susceptible to such a construction. This Court

---

[2] The Third Circuit referred to *Reno v. ACLU*, 521 U.S. 844 as *Reno II*, to distinguish it from its own case, which it called *Reno III*. That nomenclature will be followed in this brief.

indicated that a statute would be readily susceptible to a narrowing construction when "the text or some other source of congressional intent identified a clear line that this Court could draw." *Id.* Other courts have also shed light on when a statute is or is not readily susceptible to such a construction. For example, the Tennessee Supreme Court has indicated that textual ambiguity (but not vagueness) can serve as an indication that a text is readily susceptible to a narrowing construction. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993). This Court could adopt this approach as well. Indeed, one federal court has gone so far as to state that *any* reasonable reading should be accepted to save a statute from a facial overbreadth challenge, even if it is one of several possible conflicting readings. *Rhode Island Med. Society v. Whitehouse*, 66 F. Supp. 2d. 288 (D.R.I. 1999).

As will be discussed, under any of these approaches, COPA is susceptible to a narrowing construction since the proposed construction is reasonable, it is based on an ambiguity in one phrase,

and it does not require this Court to draw any lines that Congress has left undrawn.

A. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is reasonable.

COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. There is no reason why, in rejecting the government's "adult community" argument, the language must be construed to mean the community of the recipient rather than the community of the creator. If the creator is subject only to the standards of his or her own community, the Third Circuit's concern vanishes.

This construction is a reasonable one. ~~In~~ *Rhode Island Medical Society*, the court was discussing the construction of a state, not a federal, statute. However, its comments on reasonableness were properly derived from this Court's cases dealing with both types of statutes and are germane here. The *Rhode Island*

Medical Society court, in coming to its determination that every reasonable construction must be considered, relied upon a more general statutory canon of this Court and simply applied in the context of a facial overbreadth challenge. The canon relied upon by the *Rhode Island Medical Society* court is that courts must apply *any* reasonable construction that would be constitutional. The *Rhode Island Medical Society* court, 66 F. Supp. 2d at 306, quoted this Court's opinion in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trades Council*, 485 U.S. 586, 575 (1988) for this proposition: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." In turn, the *DeBartolo* Court relied upon no less than nine cases in support of this canon of construction, 485 U.S. at 575, including *Hooper v. California*, 155 U.S. 648, 657 (1895), which the *DeBartolo* Court quoted for the proposition that "the elementary rule is that every

reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Thus, the *Rhode Island Medical Society* court's approach is consistent with this Court's own approach. In *Rhode Island Medical Society*, the court was concerned that none of the competing narrowing constructions offered in defense of Rhode Island's partial birth abortion statute were reasonable because they all involved reading complex medical procedures or distinctions into the statute. 66 F. Supp. 2d at 306-07.

In the instant case, by contrast, nothing need be read into the statute except a single prepositional phrase—"of the creator's community"—needed to clarify a single patent ambiguity. COPA's text, including the definitional sections, leaves completely unanswered the question, "From which community do the contemporary community standards derive?" It is certainly reasonable to answer that the community should be the community of the creator of the material. This completely eliminates the Third Circuit's concern that web "publishers would necessarily be compelled to

abide by the 'standards of the community most likely to be offended by the message.'" *Reno III*, 217 F.3d 162, 177 (3d Cir. 2000) (*citing Reno II*, 521 U.S. 844, 877-878 (1997)).

Neither is this approach undercut by this Court's statement in *DeBartolo* that, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. This is for the simple reason that Congress' intent cannot be determined. As the Third Circuit pointed out, *Reno III*, 217 F.3d at 174-75, Congress claims, on the one hand, to have intended to incorporate the *Miller* standards—which are clearly geographically based—and, on the other hand, to have intended to reject *Miller's* geographically based standards in lieu of an "adult" standard.

In attempting this "have their cake and eat it too" approach, Congress merely ended up expressing two mutually exclusive intentions, thus leaving the real intention undiscernible. It was for this same reason that this Court refused to be bound by one of Congress' two

purported intentions when it evaluated the constitutionality of the CDA in *Reno II*.

In that case, this Court stated that "[t]he CDA, which implements the 'contemporary community standards' language of *Miller*, thus conflicts with the Conferees' own assertion that the CDA was intended 'to establish a uniform national standard of content regulation.'" *Reno II, 521 U.S.* at 874, n.39 (citation omitted).

Thus, under the *Rhode Island Medical Society/DeBartolo/Hooper v. California* approach, COPA is readily susceptible to a narrowing construction whereby "contemporary community standards" is construed to mean the standards of the community of the creator of the material.

B. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is based upon an ambiguity in one phrase.

As is evident from the discussion above, the same line of reasoning indicates that COPA is readily susceptible to the narrowing construction under the

Tennessee Supreme Court's approach to determining ready susceptibility. In *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993), the Tennessee Supreme Court declared that an ambiguity in a key term in a statute rendered it readily susceptible to a narrowing construction. Thus, for all the reasons stated above, COPA's ambiguity regarding which community's standards are to be employed renders it readily susceptible to a saving narrowing construction.

C. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" does not require this Court to draw any lines that Congress left undrawn.

Finally, under the standard articulated by this Court in *Reno II*, 521 U.S. at 884, COPA is also susceptible to this narrowing construction. There this Court declared that a statute is not readily susceptible to a narrowing construction if the Court would be called upon to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so

'involves a far more serious invasion of the legislative domain.'" *Id.* (*quoting United States v. Treasury Employees*, 513 U.S. 454, 479, n.26 (1995)).

Here, this Court would not have to draw any lines whatsoever. As the Third Circuit noted below, when Congress enacted COPA, it was specifically attempting to fully addressed this Court's concerns about the CDA. *Reno III*, 217 F.3d at 167. As the Third Circuit admits, COPA "restrict[s] its scope to material on the Web rather than on the Internet as a whole; [ ] target[s] only those Web communications made for 'commercial purposes'; and [ ] limit[s] its scope to only that material deemed 'harmful to minors'." *Id.* (footnotes omitted). Thus, the lines have all been drawn. Line drawing was never the Third Circuit's concern in this case. Rather, that court was simply concerned that the narrowing construction offered by the government was not convincing.

Thus, in sum, COPA is readily susceptible to a narrowing construction because the construction suggested is a reasonable construction and all reasonable

constructions must be adopted; because the ambiguity of a key term is an indication that the statute is readily susceptible to a narrowing construction; and because this Court is not called upon to draw any lines that Congress failed to draw.

III. STATUTORY AND CASE LAW SUPPORT EXISTS FOR CONSTRUING "CONTEMPORARY COMMUNITY STANDARDS" TO MEAN THE "CONTEMPORARY COMMUNITY STANDARDS OF THE COMMUNITY OF THE CREATOR" AND NO GOOD REASON TO REJECT THE CONSTRUCTION.

Under both 47 U.S.C. § 505 (1994) and 18 U.S.C. § 3227 (1994), venue will lie in the community of creation and not merely in the community of receipt. Furthermore, courts have explicitly held that in applying *Miller's* "contemporary community standards," those standards can be those of the community of creation. *See, e.g., United States v. Cohen,* 583 F.2d 1030, 1040-41 (8th Cir. 1978) (mailed obscenity); and *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (electronic bulletin board obscenity). Interestingly, the Third

Circuit discussed the *Thomas* case and even discussed some aspects of its treatment of the two communities, at *Reno III*, 217 F.3d at 176yet failed to consider *Thomas'* insights as a basis for a narrowing construction.

It is worth mentioning that this Court's hypothetical in *Reno II* in no way renders the proposed narrowing construction problematic. In *Reno II*, 521 U.S. at 878, this Court wrote, "Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." This hypothetical does not stand as a barrier to this Court adopting the narrowing construction of "contemporary community standards" suggested here for two possible reasons.

First, it is possible when the hypothetical was written, this Court had simply not considered the construction suggested by this brief. Thus, the hypothetical may not represent a rejection of this

construction at all. Rather, the construction may simply never have been considered. This Court may surely entertain this construction now. Indeed, this Court has previously indicated that it has a duty to do so. As quoted above, this Court has stated that "every reasonable construction *must* be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added).

Second, in *Reno II*, this Court was trying to reconcile Congress' supposed intention of "establish[ing] a uniform national standard of content regulation." 521 U.S. at 874, n.39 (quoting S. Conf. Rep., at 191), with its inartful importation of only one of *Miller's* three prongs. In COPA, however, Congress sought to overcome all of this Court's objections to the CDA. *Reno III*, 217 F.3d at 174. Not withstanding Congress' ongoing difficulty with conflicting intentions (*see supra*), the particular conflicting intentions discussed in *Reno II* along with the incomplete utilization of the *Miller* prongs have been rectified in COPA. While the matter is still less than clear, there is

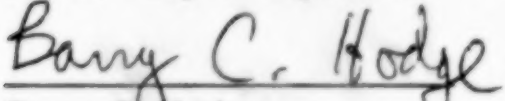
much less reason under COPA than there was under CDA to believe that Congress is trying to impose a "uniform national standard." Under these circumstances, there is no reason why the proposed construction could not be employed to avoid exactly the result that the *Reno II* hypothetical was concerned about, *i.e.*, the community standard of the recipient community need not subject the parent to liability if the home community standard would not.

Lastly, one should note that the government's failure to raise this argument is no impediment to this Court entertaining the argument. First, as noted above, this Court has previously declared that "*every* reasonable construction must be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added). "Every" is not limited to those that are raised by a party. Second, this Court has explicitly stated that it will, in its discretion, entertain issues and arguments raised only in amicus briefs. *Davis v. United States,* 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

CONCLUSION

For the foregoing reasons, the Third Circuit's conclusion that the ACLU would likely succeed on the merits is erroneous and, thus, it should not have affirmed the district court's order issuing a preliminary injunction. Therefore, this Court should reverse the decision of the Third Circuit.

Respectfully submitted
this 27th day of July, 2001.



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Supreme Court, U.S.
FILED
JUL 27 2001

No. 00-1293

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTEREST OF AMICUS CURIAE[1]

The American Center for Law and Justice ("ACLJ") is a national, nonprofit pro-life, pro-family and religious liberties organization. The ACLJ was organized to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related activities. Among other activities, the ACLJ focuses on the family as the primary social and religious institution of a just society. The ACLJ is dedicated to defending families against efforts to undermine their sovereignty, nature and importance. Moreover, the ACLJ is committed to supporting appropriate efforts by Congress and the States toward the creation and sustenance of a social order that supports the important work of families: rearing children.

The present case addresses the questioned constitutionality of a federal statute designed to provide workable, reasonable boundaries around commercial Internet sites that traffic in indecent images and messages. In enacting the Child Online Protection Act ("COPA"), Congress demonstrated its constitutionally reasonable judgment that those commercial vendors of indecent materials should bear the costs of insuring that children are not likely to access their wares. The mechanisms of the challenged statute are important means of protecting children. The proper resolution of this case is a

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1. Counsel of record for both the Petitioner and the Respondents have consented to the filing of this brief, copies of the letters indicating their consent are being filed *instanter*. Pursuant to Rule 37.6, amicus disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

matter of substantial organizational concern to the American Center for Law and Justice because of its commitment to American families.

SUMMARY OF ARGUMENT

Without argument or briefing to the point, the Third Circuit held that Congress' adoption of the "community standards" reference in the Child Online Protection Act's (COPA) "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." *ACLU v. Reno*, 217 F.3d 162, 174 (3rd Cir. 2000). With that surprising and sweeping judgment, the Third Circuit rendered the entire COPA statute unenforceable.

The judgment below is erroneous and should be reversed. Congress' reliance on community standards in determining pruriency, the signal feature of COPA that was the basis of the decision below, is completely consistent with this Court's prior decisions. Moreover, no alternative ground for affirmation of the judgment below survives analysis informed by the relevant decisions of this Court.

ARGUMENT

I. THE PROTECTION OF CHILDREN IS AN INTEREST OF THE HIGHEST IMPORTANCE

In the constitutional order, policy making is the prerogative of Congress. It does not belong to the Respondents, nor to the court below, nor even to this Court, to make or to unmake the fundamental policy judgment that the Congress embodied in the

Child Online Protection Act. Instead, it is the peculiar province of Congress to make the policy judgments that lead to the enactment of legislation. Alexander Hamilton hopefully expounded,

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist No. 78, at 393-94 (G. Wills ed. 1982). That exercise of will is the essence of policy making; consequently, the exercise of will is a legislative function.[2]

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2. Those that the laws by which a nation is governed are its governors. According the United States Constitution, Article I, the power to make laws belongs to Congress. When the power to make laws is usurped by actors within another branch, against the direction of the Constitution, then constitutional disorder is threatened. As the Great Emancipator taught, democracy itself is put in jeopardy when judicial officers play at legislation:

> The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that

A proper respect for constitutional governance not only tends to suggest that Congress should craft laws with care so that they do not cross constitutional boundaries, but also that courts should not lightly resort, or with ease, to judicial invalidations of Acts of Congress. Yet there is little doubt that the judgment of the Third Circuit evidences just such judicial ease with statutory invalidation.

Here, Congress has acted upon a policy judgment. That policy judgment is that the protection of children from the harmful consequences of exposure to indecent materials is an interest of the highest order of importance. That policy judgment is longstanding, and this Court has not found it to be constitutionally suspect. Rather, this Court has acknowledged that the interest identified by Congress is compelling. "It is evident beyond the need for elaboration" that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

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extent practically resigned their Government into the hands of that eminent tribunal.

A. Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, p. 139 (1989).

This Court has sustained laws protecting the psychological and physical well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." *Id. See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute proscribing the mere possession and viewing of child pornography); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to nonobscene pornography); *FCC v. Pacifica*, 438 U.S. 726 (1978) (regulation of indecent but nonobscene radio broadcasts to protect children).

Moreover, Congress has proceeded upon the presumption that the materials affected by its legislative judgment — indecent but not obscene materials — are entitled to some form of constitutional protection. So Congress did not attempt to suppress entirely this category of communication. Instead, COPA imposes a framework for enforcement of restrictions on access to commercial sites vending indecent materials. Congress' eminently reasonable judgment is consistent with the First Amendment and with this Court's decisions.

II. CONGRESS' USE OF THE COMMUNITY STANDARD FOR DETERMINATION OF PRURIENCY AND/OR PANDERING IS CONSISTENT WITH THIS COURT'S DECISIONS

In the world of legerdemain, one of the most familiar tricks is known as the Cups and the Balls. In the game of the Cups and the Balls, the magician offers the tempting opportunity to a mark in the crowd to select the cup under which a ball has been hidden. The magician seldom loses: his skill is measured in terms of sophisticated *mis*direction. To make the event

sporting, there are three cups and they are shifted about thoroughly on a table top, while the magician casts a spell of entertaining oratory over the mark. Only the most careful, the most crafty, are able to select the correct cup on the first try.

The familiar parlor trick of the Cups and the Balls serves well to illustrate the dilemma presented to Congress as it pursues its constitutional prerogative of setting national policy by legislation. The Congress has devoted particular attention to the task, just like the mark does when he is invited to play along at the adept's table. The Congress has carefully considered the holdings of this Court, in cases considering challenges to statutes analogous to COPA, just like the mark carefully listens to the mellifluous intonations of the magician. And, just like the mark who feels played for a fool when the cup he selects holds nothing, so Congress is made to seem to play the fool, at least in the light of the Third Circuit's decision.

But COPA is not deserving of the treatment given it below. The scope of COPA is limited to materials that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998). Assertions by the Respondents notwithstanding, COPA applies only to material that is "clearly pornographic," and not to "entertainment, library, or news materials that merely contain nudity or sexual information." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). Nonetheless, the Third Circuit, affirming the grant of a preliminary injunction, concluded that COPA "impose[d] an overreaching burden and restriction on constitutionally protected speech," *ACLU v. Reno*, 217 F.3d 162, 176 (3rd Cir. 2000). That conclusion flowed from the court's reasoning that "COPA[unconstitutionally relies] on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." 217 F.3d at 173. The Court reasoned that:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability.

217 F.3d at 166.

The Third Circuit was wrong. Its holding, regarding the constitutionality of COPA's community standards provision, conflicts with this Court's decisions in directly relevant

circumstances.

First, the decision below cannot be squared with *Miller v. California*, 413 U.S. 15, 24, 30 (1973). In *Miller*, this Court upheld the constitutionality of applying community standards to determine whether material appeals to the prurient interest and is patently offensive. Since the decision in *Miller*, it has been an accepted feature of the landscape of pornography regulation that pruriency and patent offensiveness may be determined according to localized standards.

Second, the decision below cannot be squared with either *Hamling v. United States*, 418 U.S. 87 (1974) or *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). In both cases, this Court found no constitutional barrier to requiring commercial entities whose commercial activities have effects in multiple geographic areas to bear the responsibility for complying with the standards in each geographic area. COPA's incorporation of a community standard does not violate the First Amendment.

The facts of *Hamling* and *Sable* are not distinguishable in any significant way from those presented by the activity regulated under COPA. Neither case presented instances of expressive activity that was, in fact, limited in its commercial distribution to a single, isolated location. This Court's holdings in those cases cannot support any conclusion to the contrary. Rather, those decisions leave intact the fair and reasonable requirement that those commercial entities enjoying the benefit of a nationwide market should ensure that those communications are not harmful to children throughout the nation. Commercial decisions need not be rewarded, just as they

are not necessarily being "punished" by a decision to subject their transmission to reasonable standards. When a commercial entity chooses to speak to an "audience . . . comprised of different communities with different local standards," it must "ultimately bear[] the burden of complying with the prohibition on [harmful-to-minor] messages." *Sable*, 492 U.S. at 126.

In their Brief in Opposition, as 22-23, Respondents charged that technological deficiencies of the World Wide Web were such that, in order for commercial entities to comply with the requirements of COPA, they would be required to comply with the standards of the most conservative community from which minors could access the World Wide Web. That argument suffers from two problems, at least. First, as a matter of fact, Congress concluded that the harmful to minors standard is "one that is reasonably constant among adults in America." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). And Respondents muster no proof to the contrary. Consequently, Congress has concluded that what is considered "harmful to minors" in one geographically isolated locale in the United States is not likely to be different in kind or substance from that which is thought to be "harmful to minors" in other regions.

Second, the argument of technological deficiency is utterly lacking in meritorious weight. An illustration of its application shows that it warrants no consideration. Take the instance of ordinances regulating the volume of noise projected by sound trucks. It could not be reasonably thought a defect in such *ordinances* that the manufacturers of amplifiers used in sound trucks only constructed amplifiers with one setting: maximum. Yet this is the very argument offered by the Respondents; there is more of a tantrum in such an argument than there is of

comprehension of the compelling interests at stake in Congress' effort to set national policy regarding commercial dissemination of indecent materials to minors.

Thus, the court of appeals erred in its community standards holding.

III. THE ALTERNATE GROUNDS OF AFFIRMANCE PRESSED BY THE RESPONDENTS ARE WITHOUT MERIT

The ACLU glibly recasts COPA as nothing more than *CDA II*,[3] Opp. Br. at 9-13, but one must approach the magician's table with care. In fact, it is nearly certain that, as when the magician speaks, *mis*direction is in the works with the ACLU's assertion. This fact can be adduced from the substantial differences between COPA and the Communications Decency Act of 1996 and from the failure of the ACLU to see or acknowledge those differences. The differences between the two statutes demonstrate the attention paid by Congress to this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997). Because of the care taken by Congress, COPA is, in fact, the least restrictive means to accomplish the compelling interest in protecting minors from the harm associated with exposure to indecent materials on the World Wide Web.

The following key points of distinction exist between CDA and COPA:

---

3. *See, e.g.*, ACLU Press Release titled "House Committee Approves CDA II" (Sept. 24, 1998) (located at http://www.aclu.org/news/n092498b.html).

CONTRASTS BETWEEN CDA AND COPA	
CDA	**COPA**
Breadth of Reach	
applied to all Internet communication, including e-mail, listservs, newsgroups, chat rooms, and the World Wide Web[4]	applies only to materials on the World Wide Web[5]
Scope of Materials Covered	
applied to any material that was "indecent" or "patently offensive," without defining those terms[6]	applies only to material that satisfies the specific three-prong standard
Minors Affected	
minor is any person under the age of 18[7]	minor is "any person under 17 years of age"[8]

4. *Reno v. ACLU*, 521 U.S. at 851.

5. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, supra, at 12, 25.

6. *Reno v. ACLU*, 521 U.S. at 871 & n.37, 873, 877.

7. *Reno v. ACLU*, 521 U.S. at 865-866.

8. 47 U.S.C. 231(e)(7) (Supp. IV 1998); *cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming statute of similar scope).

CONTRASTS BETWEEN CDA AND COPA	
CDA	**COPA**
Actors Affected	
applied to commercial entities or transactions, to all nonprofit entities, and to individuals posting messages on their own computers[9]	applies only to those Web communications that are made "for commercial purposes"[10]
Impact on Family Governance	
barred parents from permitting their children from using a family computer to view regulated material[11]	contains no such prohibition[12]

Each of the foregoing five factors was considered by this Court in *Reno v. ACLU*. In fact, this Court offered these factors as illustrations of its judgment that the CDA could not be justified under *Ginsberg* and of why it failed strict scrutiny. *See Reno*, 521 U.S. at 865-866, 870-874, 877-879. Thereafter, in light of this Court's decision, Congress again took up the problem of proliferating indecency on the Internet. With

9. *Reno v. ACLU*, 521 U.S. at 856, 865, 877.

10. 47 U.S.C. 231(a)(1) (Supp. IV 1998).

11. *Reno v. ACLU*, 521 U.S. at 865, 878.

12. H.R. Rep. No. 775, *supra*, at 15.

COPA, Congress tailored its legislative response in a manner that responds to those very concerns that this Court identified. Thus, Respondents misplace their reliance on *Reno v. ACLU* and are incorrect in their assertion that *Reno* requires invalidation of COPA.

The differences between CDA and COPA are real and meaningful. Unlike some other means of communication on the Internet, screening for age on the World Wide is feasible both technologically and economically. Pet. App. 75a-77a. COPA's three-prong harmful-to-minors standard mirrors the statutory standard considered and approved by this Court in *Ginsberg*. The standard adopted by COPA is free of the vagueness that plagued the CDA. And Congress gave COPA a decidedly narrower focus; consequently such things as the seven "dirty words" monologue, *see FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and library card catalogues, are not at risk. *See Reno v. ACLU*, 521 U.S. at 878. Moreover, Congress' decision to lower the age restrictions of COPA to less than 17 gives more mature minors access to the affected materials. Those that post material "for commercial purposes" should reasonably be expected to bear the cost of compliance; such is simply one facet of the cost of doing business. Finally, Congress' decision to lift the bar on parents permitting their own children to view affected materials averts interference with the parent-child relationship. To say, as Respondents' have, *see* Brief in Opposition at 12-13, that differences between the CDA and COPA have "no constitutional significance" is simply incorrect.

Alternatively, Respondents contend that COPA unconstitutionally burdens constitutionally protected speech because it deters adults from seeking access to material

screened by adult verification services. Perhaps "some" adults will be deterred as they seek out regulated materials because they have been placed behind adult verification services, *see* Pet. App. at 81a. That effect is a small price to pay to protect children from materials deemed harmful to minors, including graphic pornographic images on the World Wide Web.

If Respondents are correct, and if the slight inconvenience of using an adult verification service to access indecent online materials rises to the level of an unconstitutional burden, then state laws obliging commercial vendors to place "harmful to minors" material behind a "blinder rack," in a "sealed wrapper," or inside an "opaque cover," and that require proof of adult status for purchase of such materials, are all also unconstitutional. Each of those laws deters "some" adults from buying the regulated materials. Nonetheless, lower courts consistently affirm the constitutionality of such laws. *See, e.g., Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *American Booksellers v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). No other result is warranted in this case.

Finally, in a moment of some irony, respondents press the case that COPA is not narrowly tailored because filtering software used by parents is less restrictive and at least as

effective.[13] COPA requires Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under the less restrictive alternative view pressed by the Respondent, there would be no entity that Congress could compel to use filtering software. *See* Pet. App. 94a n.6; *compare United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Moreover, as the ACLU has elsewhere claimed, *see* n.12, *supra*, blocking software is of limited efficacy, because filters can block inoffensive materials while failing to screen other, offensive materials. *See* Pet. App. 94a. Moreover, computer-savvy minors can easily defeat such filtering programs. *Id.* at 82a.[14] And filtering software is not

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13. The irony stems from the fact that in another case, now pending in the Eastern District of Pennsylvania, ACLU attorneys have challenged the efficacy and constitutionality of filtering requirements. There, representing libraries, library consortia, library patrons and web content providers, the ACLU has asserted that a federal law compelling grant recipient libraries to use filtering technology on computers available for the use of minors. *See Multnomah County Public Library, et al. v. United States*, Civil Action No. 2:01cv01322, Complaint ¶¶ 83-121 (E. D. Pa. complaint filed Mar. 20, 2001) (setting forth factual assertions for claim that filtering technology is ineffective and unreliable). So COPA is unconstitutional, the ACLU claims, because filtering is a less restrictive alternative. But, out of the other side of its mouth, the ACLU is telling a three-judge district court in Pennsylvania that filtering is ineffective, inefficient, and, where mandated by federal law, unconstitutional.

14. And computer-savvy minors who want to crack filtering programs find plenty of assistance on the World Wide Web. One site, for example, "Peacefire" offers cracking advice on every major filtering program currently marketed in the United States. *See* Peacefire Homepage (http://www.peacefire.com) (offering links to cracking instructions for CYBERsitter, Cyber Patrol, Net Nanny, BESS, SurfWatch, SmartFilter, X-Stop, NetRated, I-Gear, and SafeSurf). The motto of Peacefire, it seems, *see id.*, is "*It's not a crime to be smarter than your parents.*"

cheap to buy, H. R. Rep. No. 775, *supra*, at 19, or cheap to maintain. *Id.* at 20 (filtering software requires periodic updates at added costs).

It is an error in the Respondents' logic to set the requirements of COPA up against filtering software; they are not mutually exclusive. Congress was aware that the two approaches could operate in a synthesis, and intended that they do so to protect minors from exposure to harmful materials. *See* 47 U.S.C. 230(d) (Supp. IV 1998) (requiring Internet service providers to notify customers of the availability of blocking software); H.R. Rep. No. 775, *supra*, at 19 (noting that blocking software may be effective for many parents). Disputes over comparative effectiveness of these alternatives are beside the point. More pertinent is the question whether Congress's plan -- the consequence of which is that the structures provided by COPA operate jointly with parental or other blocking software -- is significantly more effective in blocking minors' access to harmful materials than blocking software alone. Because, taken together, the two approaches are much more effective in screening harmful materials, the alternative proposed by the Respondents is not as effective as the scheme that Congress enacted.

CONCLUSION

For all the foregoing reasons, the judgment below should be

reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 00-1293

In The

Supreme Court of the United States

JOHN ASHCROFT,
Attorney General of the United States,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF DUPAGE, ILLINOIS, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois. With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year. The parents, teachers, school officials and prosecutors of DuPage County, Illinois, have a substantial interest in the issue of whether federal, state and local governments may restrict the time, place and manner that vendors of sexually explicit materials may peddle their products. Thus, the rights of federal, state and local units of government to take reasonable and necessary measures to ensure the health, safety and welfare of society's children is of profound concern to the *Amicus Curiae*.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amicus Curiae* filing this brief. The consent letters have been submitted with this brief.

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The relief sought by respondents presents a substantial threat to the ability of federal, state and local governments across this nation to take reasonable and necessary measures to protect the health, safety and welfare of its children.

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. §§ 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes restrictions only in those limited areas where the commercial speech affects children. Said another way, COPA requires vendors of sexually explicit materials to install guarantees that children may not access web sites containing sexually explicit materials. These regulations do not restrict the peddling of sexually explicit materials in lawful transactions to adults. To the contrary, COPA solely requires vendors of sexually explicit materials to take reasonable steps to ensure that their sexually explicit materials are not improperly disseminated to an audience that the law does not permit these vendors to approach. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*[2], and therefore should be upheld by this Court.

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[2] *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989).

The respondents seek the benefit of unfettered discretion to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, respondents' rights to seek and attain corporate profits from the sales of sexually explicit materials will supercede the rights of parents, teachers, principals, school boards, prosecutors and others acting in *parens patriae*, to create safe harbors where children are safe from the devastating effects of sexually explicit materials.

The respondents further seek to attain First Amendment protections for sexually explicit advertising not previously afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from federal, state or local state regulation sought by respondents is unprecedented.

The *Amicus* respectfully urges this Court to affirm that commercial speech can be restricted where the interests of children are at stake and that the rights of commercial Internet vendors peddling sexually explicit materials is not absolute under the First Amendment of our nation's Constitution.

ARGUMENT

I. THE LEGISLATURE MAY RESTRICT COMMERCIAL SPEECH ON THE INTERNET TO PROTECT THE HEALTH AND SAFETY OF CHILDREN.

A. The Health Of Children Constitutes a "Substantial Interest" Which Clearly Justifies The Legislature's Right To Commercial Speech On The Internet.

This Court has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The law is well settled that a legislature can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik*, 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long been a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York*, 390 U.S. 629 (1968), this Court sustained a law which protected children from non-

obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia*, 394 U.S. 557, 566 (1969), this Court has allowed stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

More recently, this Court reiterated the position it has taken in prior cases permitting the balance of First Amendment rights to be tipped in favor of the health of children. In *Osbourne v. Ohio*, 395 U.S. 103 (1990), this Court stated:

> It is evident beyond the need for elaboration that [the government's] interest in safeguarding the physical and psychological well-being of a minor is compelling. . . .

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. This threat has been well documented. Mr.

J. Robert Flores, Vice President for the National Law Center for Children and Families, stated to Congress' Committee on Commerce (Subcommittee on Telecommunications, Trade and Consumer Protection) at a hearing on Obscene Material Available on the Internet, that sexually explicit materials pose a real and significant threat to our nation's youth:

> Does this threaten children? You better believe it does. Our kids and grand-kids see it and become indoctrinated by it.

Statement of J. Robert Flores, Esq., Vice President and Senior Counsel, National Law Center for Children and Families before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, Hearing on: Obscene Material Available Via The Internet (May 23, 2000). Mr. Flores elaborated on the increased effort that vendors use to market sexually explicit materials over the Internet:

> The pornography industry has also become among the most aggressive marketers on the Internet, using newly developed "push" technologies . . . [T]hus, even if it were true, and I doubt it, that only those who sought out obscenity could find it, today only a lucky few are able to avoid it, as the Internet user community is bombarded with advertisements, tricked into visiting sites, given hot links to porn when search engines are asked for innocent sites, sent unsolicited porn spam e-mails, and trapped in endless mousetraps that bounce them from porn site to porn site when they try to leave.

Id. Our nation's children are not immune from the situation described by Mr. Flores' in his statement. The Thursday, October 7, 1999 edition of *The Florida Times Union* reported that 91 percent of teenagers responding to a survey responded that they have stumbled across an Internet web site that their parents would find objectionable.[3]

A March 28, 2000 survey commissioned by the National School Boards Association (NSBA) and supported by the Children's Television Workshop and Microsoft, reported one of parents' top concerns about their children using the Internet was the possibility that their children will encounter pornography. According to this survey, 78 percent of children ages 13 to 17 said they use the Internet when they are alone.

There is a real threat to our nation's children posed by the inordinate amount of information, and sexually explicit materials, available to anyone with a computer and a connection to the Internet. The vast majority of children clearly are using the Internet alone, and virtually all of these children have been exposed to objectionable material during their travels down this "information superhighway." Children lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

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[3] This survey, published by the Safe America Foundation and Yankelovich Partners, Inc., surveyed 502 parents and 503 teens on Internet issues in August 1999.

Congress enacted COPA as a response to the need to protect the nation's children from the dangers they may encounter on the Internet. The serious impact of sexually explicit material on our nation's children clearly supported COPA's enactment. The impact that sexually explicit materials has on children in this nation clearly supports a balancing of First Amendment rights by this Court to affirm COPA's validity and enforceability.

B. The First Amendment Is Not Absolute And Thus The Peddling of Sexually Explicit Materials On The Internet Is Not Immune From Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded some level of protection under the First Amendment from unwarranted governmental interference. Respondents' arguments in essence are an attempt to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that the communication of all sexually explicit materials on the Internet will be virtually immune from any and all regulation. Said another way, respondents' arguments, if successful, will elevate the peddling of sexually explicit materials on the Internet to a degree that it is afforded the same constitutional protections that are traditionally afforded to political speech. The respondents' positions are contrary to the letter and spirit of prior decisions made by this Court and should be flatly rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike the peddling of sexually explicit materials on the Internet, profit is not the central motive. In fact, in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) this Court laid the foundation for the exclusion of sexually explicit materials from the realm of constitutionally protected expression. *See generally, New York v. Ferber*, 458 U.S. 747 (1982). There, this Court clearly established that the act of peddling of sexually explicit materials is not afforded absolute protection under the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted). Consistent with its decision in *Chaplinsky*, this Court squarely held in *Roth v. United States*, 354 U.S. 476 (1957) that "obcenity is not within the area of constitutionally protected speech. . . . " In *Chaplinsky*, this Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment:

> The original States provided for the prosecution of libel, blasphemy, and profanity, and the universal judgment that obscenity should be

> restrained [is] reflected in the international agreement of over 50 nations, in obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956.

New York v. Ferber, 458 U.S. 754 (footnotes omitted).

There are many examples where this Court has held numerous types of non-commercial speech are afforded First Amendment protections. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change.

However, this Court has also ruled that even true political speech is not immune from governmental restriction. This Court has refused to extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently

important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has regularly restricted other forms of speech where profit was not the central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra*, 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like the commercial peddling of sexually explicit materials on the Internet, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial

transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

In this case, the respondents seek a judicial license to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, respondents rights to seek and attain corporate profits from the sale of sexually explicit materials will supercede the rights of parents, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of sexually explicit materials.

C. A Legislature's Restrictions On The Peddling Of Sexually Explicit Materials Pass Constitutional Muster If They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a legislature has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the legislature is not required to employ the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, the legislature has established that the health and safety of children are substantial interests that supercede any First Amendment protection that Internet advertisers may have otherwise had in the absence of these substantial interests.

The legislature is not required to seek out and use the least restrictive means available to protect children from

the negative effects of exposure to sexually explicit materials. Respondents have suggested that the legislature is required, or should be required, to apply the least restrictive means test when restricting commercial speech. The *Amicus* acknowledges that this Court, in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in all commercial speech cases. *Fox, supra.*

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than it has been previously afforded by this Court. *Id.* Jusice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a

> "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decision-makers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.,* 455 U.S. 191 (1982).

The legislature is not required to use the absolute least restrictive means that guarantees in each and every circumstance that children, and children only, will be insulated from the adverse effects of sexually explicit materials. The legislature is required only to demonstrate that its restrictions on the peddling of sexually explicit materials on the Internet is *reasonably related* to the goal of protecting childrens' health and that its restrictions are narrowly tailored to achieve that purpose.

The regulations at issue here clearly satisfy this Court's test. The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. §§ 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes

restrictions only in those limited areas wherein the commercial speech affects children. These regulations do not restrict or in any way bar the peddling of sexually explicit materials through lawful transactions to adults. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox,* and therefore should be upheld by this Court.

CONCLUSION

The *Amicus Curiae* County of DuPage, Illinois, respectfully requests that this Court rule in favor of Petitioner John Ashcroft, Attorney General of the United States.

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Dated: July 27, 2001

Supreme Court, U.S.
FILED
SEP 20 2001
CLERK

No. 00-1293

IN THE

Supreme Court of the United States

JOHN ASHCROFT, Attorney General,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of The Association of American Publishers, Inc.; The American Society of Newspaper Editors; The Center for Democracy and Technology; The Comic Book Legal Defense Fund; The Computer & Communications Industry Association; The Freedom to Read Foundation; The National Association of Recording Merchandisers; Newspaper Association of America; The Periodical and Book Association of America, Inc.; The Publishers Marketing Association; The Recording Industry Association of America; and The Society for Professional Journalists as *Amici Curiae* in Support of Respondents

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INTEREST OF THE *AMICI*

This brief *amici curiae* is submitted on behalf of a spectrum of businesses, trade associations, and public interest organizations that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication suitable for both children and adults. *Amici* variously constitute and represent:

- authors, publishers, editors, and distributors of textual, audio, and audio-visual material ranging from books, magazines, newspapers, newsletters, and comic books to sound recordings;
- educators and librarians whose students and patrons desire access to the widest possible range of informative material;
- Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it;
- software developers and technology concerns who, responding to the market's demands, have been developing ever more effective means for parents to protect minors from exposure to age-inappropriate materials; and
- public interest organizations reflecting parental and community concerns that possibly well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.[2]

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1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained, and are herewith lodging, the written consents of the parties to the filing of this brief.

2. *Amici* are more fully described in Appendix A.

Amici are deeply concerned about Congress' latest attempt to censor what this Court has recognized to be a "dynamic, multifaceted category of communication" – the Internet – by transforming it into a child-proof medium whose "level of discourse" would be reduced to that "suitable for a sand box." *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74 (1983). The First Amendment does not allow such misguided sanitizing of public discourse.

Congress' first effort at regulating speech on the Internet took the form of the Communications Decency Act of 1996, Pub. L. No. 104-104, §502, 110 Stat. 103 (hereinafter "CDA"). That legislation criminalized speech over the Internet that was "patently offensive" or "indecent" for minors. In the ensuing legal challenge to the CDA, first a three-judge panel of the Eastern District of Pennsylvania, and then this Court, found the CDA to be facially unconstitutional because of its inevitable consequence: "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have the constitutional right to receive and to address to one another," thereby impermissibly "reduc[ing] the adult population . . . to . . . only what is fit for children." *ACLU v. Reno*, 521 U.S. 844, 874-75 (1997) ("*ACLU*") (citations omitted).

After the CDA was struck down, Congress again attempted to enact "minors access" legislation for the Internet. Unfortunately, the Child Online Protection Act, Pub. L. No. 105-277, Div. C, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (codified at 47 U.S.C. § 231 (Supp. V. 1999)) (hereinafter "COPA") suffers the same crippling constitutional flaws that condemned the CDA insofar as it:

- targets a potentially broad category of speech that is entirely lawful as to adults, but is "harmful to minors";
- criminalizes the offer of such speech by a potentially large number of Internet speakers, unless such speech is rendered inaccessible to minors; and

- presupposes that credit card and age-verification techniques adopted by Congress as affirmative defenses impose no burden on speech, when, in fact, they surely will discourage readers of controversial or potentially controversial material and burden many would-be speakers.

For these reasons, among others, Judge Lowell A. Reed, Jr. of the United States District Court for the Eastern District of Pennsylvania, following a five-day evidentiary hearing, entered a preliminary injunction against the enforcement of COPA, *see ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) ("*COPA I*"), which was upheld by the Court of Appeals for the Third Circuit. *See ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) ("*COPA II*").

The district court found that respondents had set forth compelling evidence of COPA's chilling effects through the testimony of certain Web site owners that, although they did not believe any material on their sites was harmful to minors, they would "self-censor the content of the site" because they feared prosecution under COPA. *COPA I*, 31 F. Supp. 2d at 485. In the face of the many ambiguities of the harmful-to-minors standard as embodied in the statute, *amici*'s constituents, like respondents, find themselves in the untenable posture of choosing between gambling on offering speech that a local federal prosecutor may believe is "harmful to minors," thereby subjecting themselves to potential criminal and civil penalties, or engaging in self-censorship and avoiding that risk. *Amici* fervently believe that the First Amendment protects Internet speakers from that untenable choice.

None of *amici*'s constituents are engaged in the business of commercial pornography, yet *amici* appear here because they fear that the speech they produce, distribute, use as teaching aids, and otherwise provide access to via the World Wide Web stands at risk of challenge under COPA. It is far from inconceivable, for example, that a prosecutor could rely on

COPA in attempting to suppress material on mainstream Web sites such as the following:

- A publisher's Web site that makes available excerpts from a romance novel that contain graphic sexual content and photographs of male genitalia from a fine art photography book
- An online bookstore's Web site that contains quotations from books in its catalogue, including from textbooks concerning human sexuality
- An online library's Web site that allows users to "check out" and read books about human sexuality
- A record company's Web site that includes clips of songs or videos containing sexually-explicit material
- A Web site for fans of a musician or author that offers a message board or chat room where sexually-explicit messages have been posted
- An online dictionary that includes definitions of various sexual practices
- Search engines that provide hyperlinks to Web sites that include graphic sexual content
- A newspaper's Web site that provides hyperlinks to Web sites that include graphic sexual content

On its face, COPA applies to any Web site that, in the regular course of business, communicates *any* material that is harmful to minors. 47 U.S.C. § 231(a)(1)-(3); 47 U.S.C. § 231(e)(2)(B). *See COPA I*, 31 F. Supp. 2d at 480 (COPA "imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that includes any

material that is harmful to minors' "). Thus, the government's contention that "COPA's principal effect is to require . . . commercial pornographers to place their free teasers behind adult verification screens," Brief for the Petitioner ("Pet. Br.") at 39, finds no support in the law itself and thus affords no protection to *amici*'s constituents. As the district court observed, "[t]here is nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers only." *COPA I*, 31 F. Supp. 2d at 480.

Moreover, because COPA imposes "contemporary community standards" as to what is of "prurient interest" and "patently offensive with respect to minors" on speech available nationwide on the World Wide Web, it effectively gives a heckler's veto to communities with the most restrictive standards. As the court of appeals noted, because "Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site," *COPA II*, 217 F.3d at 176, they will be "compelled to abide by the 'standards of the community most likely to be offended by the message.' " *Id.* at 177 (*quoting ACLU*, 521 U.S. at 877-78). Incidents involving material widely considered American literary classics, such as the removal of the Pulitzer Prize-winning novel *To Kill A Mockingbird* from the required reading list at an Oklahoma high school,[3] and one Florida county Board of Education's proposal to eliminate from the curriculum literary works containing profanity, including *Catcher in the Rye*, *The Adventures of Huckleberry Finn*, *Gone With the Wind*, *Romeo and Juliet*, *Macbeth*, and *Farenheit 451*,[4] illustrate how widely views diverge in different parts of the country as to what material is suitable for minors. Such incidents also suggest the special danger to free speech rights posed by arming prosecutors with a censorious tool such as COPA to regulate a new medium

3. *See* "High School Yanks 'Mockingbird' From Reading List," *Chicago Tribune*, Aug. 4, 2001, at A12.

4. *See* Teresa Stepzinski, "Profanity Ban Outcry Shocks Glynn Board," *Florida Times-Union*, Aug. 15, 2001, at A1.

that is susceptible neither to geographic nor age-based restriction of its audience.

Rather than being threatened with civil or criminal sanctions, the enterprises represented by, and whose Internet speech is facilitated and encouraged by, *amici*, are constitutionally entitled to participate fully in the growth and development of the Internet. Indeed, *amici* every day work in myriad ways to fulfill the *ACLU* courts' vision of the Internet, continually searching for means of responding to the public interest in all manner of information and entertainment, while preserving the wondrously spontaneous and interactive quality of this medium. Through their Web sites, the varied communications entities whose speech interests are fostered by *amici* are affording the American public access to more information and entertainment, faster and more cheaply than ever before. The functions of publishers' catalogs, magazine and newspaper kiosks, book and record stores, indeed, entire libraries, are captured in the Web site offerings of *amici*'s constituents. And this is just the beginning.

In addition, *amici* in the Internet/online service provider industry have built dynamic, two-way communications networks that permit users to send and receive information of their choice, thereby enhancing the uniquely user-controlled and interactive quality of this medium. They are investing in ever-faster networks and are expanding the array of rich multimedia applications available to consumers.

COPA threatens to impede this exploration by adopting "rules of the road" that invite the cleansing from central Internet speech sites of speech for "commercial purposes" that arguably is not suitable for minors, all in derogation of the First Amendment. That a particular speaker may publish for "commercial purposes" does not diminish his or its First Amendment freedom. This nation's free-speech tradition is fulfilled no less robustly by the *Philadelphia Inquirer* than a not-for-profit newspaper or newsletter; no less by Time Warner's Cable News Network than C-SPAN; no less by Barnes

& Noble than a public library. The CDA litigation reaffirmed that the ability of the Internet to achieve its potential as a speech medium is dependent upon the diversity of the speech it protects and fosters. Because the inevitable consequence of COPA is a substantial contraction of such speech, this Court should affirm the court of appeals and strike it down as unconstitutional on its face.

SUMMARY OF ARGUMENT

In *ACLU*, this Court reasoned that the burden imposed by the CDA on adult speech was unacceptable because the technological means proposed by the CDA for screening unsuitable materials from minors while, at the same time, not unduly burdening adult speech were, in combination, ineffective and unproven. (These proposed screening mechanisms were presented in the CDA as affirmative defenses.) At the same time, the Court found that a less restrictive means of accomplishing the statute's objectives — user-driven technology that gives parents greater ability to regulate their children's access to material they believe is inappropriate for them to receive over the Internet — would soon be widely available.

Central to the Court's ruling in *ACLU* were the unique attributes of the Internet, which make it fundamentally different from any medium preceding it: its ability to support a spontaneous and cost-free "never-ending worldwide conversation," in which each participant, irrespective of his or her means, has a voice. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). This Court in *ACLU* contrasted the Internet with the broadcast medium in that "the 'odds are slim' that [an Internet] user would enter a sexually-explicit site by accident." *See ACLU*, 521 U.S. at 854.

Congress' "fix" in COPA fails to remedy the CDA's fundamental defect. Despite attempts to circumscribe the scope of the restriction, COPA still impermissibly burdens constitutionally-protected speech because its regulations are not

narrowly tailored to meet a compelling government interest, as strict scrutiny requires. Specifically, despite the purported narrowing of its application to "commercial speech" on the World Wide Web and its revised "harmful to minors" test, COPA's attempted protection of minors still would deprive adults of speech that is constitutionally-protected as to them. This attempted deprivation still would violate the First Amendment, and COPA's affirmative defenses are insufficient to remedy the threat of criminal prosecution and sanctions for entities that offer constitutionally-protected speech. In addition, as the court of appeals recognized, the "community standards" aspect of COPA is unworkable in the "virtual" community of the Web and would result in the suppression of a substantial amount of speech that Web users are constitutionally entitled to receive. COPA's provisions therefore inevitably will result in the chilling of speech in the most democratic medium ever developed.

ARGUMENT

I. THE CONSTITUTIONAL STANDARDS APPLIED IN *ACLU v. RENO* TO STRIKE DOWN THE CDA ARE EQUALLY APPLICABLE HERE, AND REQUIRE THAT COPA BE INVALIDATED AS WELL

A. Content-Based Regulations of Speech Must Be the Least Restrictive Means of Advancing a Compelling Government Interest

It is a well-settled precept of this Court's First Amendment jurisprudence that strict scrutiny shall be applied to content-based regulations of speech and that regulations based on the content of protected speech are permissible only if they constitute the least restrictive means of furthering a compelling governmental interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *COPA II*, 217 F.3d at 173. This Court has confirmed the appropriateness of this test with respect to the Internet. *See ACLU*, 521 U.S. at 870 (law provides "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

Amici recognize that the government has a compelling interest in protecting minors, and they share the government's concern with the psychological well-being of minors. But "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000). And even if speech is not completely banned but merely burdened, the restrictions nonetheless require strict scrutiny by the Court. *See id.* at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

The government thus bears the burden of demonstrating that the regulations at issue are the least restrictive means of accomplishing a compelling government interest. *See Playboy*, 529 U.S. at 818 ("When First Amendment compliance is the point to be proved, the risk of non-persuasion — operative in all trials — must rest with the Government, not with the citizen.") (citations omitted). *Amici* submit that the government cannot meet this burden with respect to COPA because the content-based restrictions that COPA places upon Internet speech effectively deprive adults of access to protected speech.

B. The Constitutional Flaws Inherent in the CDA Are Not Remedied by COPA

As explained below, the means by which Congress attempted to remedy the constitutional defects in the CDA that were identified by this Court in *ACLU* are cosmetic in nature and do not rectify the underlying infirmities that continue to pervade – and require the invalidation of – COPA on the ground that it is overbroad and will chill a substantial amount of constitutionally-protected expression.

1. Whether speech is commercial or noncommercial is immaterial to its status under the First Amendment

Congress' attempt to limit COPA's scope to communications made "for commercial purposes," 47 U.S.C. § 231(a)(1), does not remedy the facial overbreadth of the statute. In drawing this distinction between commercial and noncommercial speech, COPA misapprehends the findings in the CDA litigation, which manifested concern over the censorious impact of federal "minors access" legislation on *all* manner of Internet speech, wherever originated, and whether profit-motivated or not. *See ACLU*, 521 U.S. at 877. Congress no more may regulate constitutionally-protected speech flowing to, from, and through Web sites operated "for commercial purposes" than it can those operated for non-commercial purposes. Thus, Congress' narrowing of the statute to apply only to "communication[s] for commercial purposes" "by means of the World Wide Web" does not eliminate COPA's core constitutional infirmity, which arises from the fact that there is no practicable means by which the vast majority of those who provide content over the Internet — whether profit-motivated or not — can screen out minors from accessing that content while not unduly burdening adults' access to their speech. *See COPA I*, 31 F. Supp. 2d at 495 ("[I]t can be inferred that any barrier that Web site operators and content providers construct to bar access to even some of the content on their sites to minors will be a barrier that adults must cross as well.").

Moreover, the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. As this Court made clear in *Burstyn v. Wilson*, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. 495, 501 (1952). *See also Smith v. California*, 361 U.S. 147, 150 (1959) ("It is of course no matter

that the dissemination [of speech] takes place under commercial auspices.").

It thus is by no means clear that COPA "applies only to entities that display harmful material regularly and for profit," Pet. Br. at 40, as the government asserts, or even whether "for profit" would cover material made available for free. For instance, if it is to reach the free teasers that commercial pornographers provide, COPA must extend potentially to all speech provided on the Web by a commercial entity even if that speech is provided for free, *i.e.*, the entity does not seek to profit directly by means of the speech but rather seeks to generate interest in its profit-making activities. If that is so, then free excerpts from forthcoming novels, news and magazine articles offered by advertiser-supported Web-based publications, and artistic images posted by art galleries to generate interest in exhibitions all potentially would be subject to the Act.

Furthermore, COPA's "commercial purposes" requirement is unacceptably vague.[5] What is the meaning of "regular" versus

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5. 47 U.S.C. § 231(e)(2) provides:

> (A) Commercial purposes. A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.
>
> (B) Engaged in the business. The term " 'engaged in the business' " means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the

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"principal," and how does the latter differ from the former? Is a covered entity one that regularly transmits communications that are harmful to minors, or simply one that regularly transmits communications over the Web? These uncertainties as to COPA's intended reach are reflected in the Department of Justice's pre-enactment appraisal of the "commercial purposes" requirement as one of the more "confusing or troubling ambiguities" in the statute. *See* October 5, 1998 Letter from Department of Justice Letter to Honorable Thomas Bliley, Chairman of House Committee on Commerce ("DOJ Ltr.") at 3-4. The ambiguity of COPA's "commercial purposes" requirement exacerbates its very real potential to chill a substantial amount of constitutionally-protected speech.

2. The revised definition of "harmful to minors" still will result in suppressing protected speech

In *ACLU*, this Court held that the CDA was unconstitutional because it had the impermissible effect of suppressing speech that adults have the constitutional right to receive and transmit to one another. *See ACLU*, 521 U.S. at 874. That holding would apply equally to COPA, which, no differently than the CDA, purports to restrict the offer of, and adult access to, constitutionally-protected speech when there are less restrictive ways to protect children. Thus viewed, the change from the CDA's "indecent/patently offensive" standard to COPA's "harmful to minors" standard is immaterial from a First Amendment standpoint. To the extent imposition of the "harmful-to-minors" standard on Web sites will, as with the CDA, have the effect of restricting the offer of, and adult access to, constitutionally-protected speech, such regulation is

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> World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

unconstitutional. COPA will have just such an unconstitutional effect.

The government asserts that the "harmful to minors" standard limits COPA's coverage to "materials that are clearly pornographic," Pet. Br. at 36, and that it "narrowly cabins the material that is covered by the Act, so that COPA applies primarily to pornographic teasers that appear on the sites of commercial pornographers." *Id.* at 33-34. Although the government does not contend that respondents are commercial pornographers, it asserts that "[s]ome of respondents' exhibits . . . plainly do test, and likely exceed, the legal limitations imposed by those three prongs [of the 'harmful to minors' test]." Pet. Br. at 37. This claim weakens the government's assertion that COPA applies "primarily" to Web sites devoted to commercial pornography, whose operators "already place most of their pornographic material behind adult verification screens" and highlights the broad imprecision of COPA's language, which will lead *amici* to self-censor their Web sites rather than risk prosecution.

The danger of prosecution is underscored by the Department of Justice's pre-enactment, candid appraisal of the "harmful to minors" standard as another of "the more confusing or troubling ambiguities" in the statute. DOJ Ltr. at 4. *Amici* agree with the government's pre-litigation appraisal. The "harmful to minors" standard, on its face, is neither clear nor limited. For example, in applying COPA's "contemporary community standards" requirement, is the relevant community the worldwide community of Internet users, the local community in which the user resides, or some other community? Further, does the statutory language "as a whole" refer to the single visible screen on which the "harmful" communication appears (which may be significantly less than a single Web page)? To the Web site as a whole? Does it also include linked Web sites? To what age(s) of minors is the statute directed? On this latter issue, prior to enactment of COPA, the Department of Justice itself queried whether material covered by COPA

includes that which lacks serious value "for all minors, for some minors, or for the 'average' or 'reasonable' 16-year-old minor?" *See* DOJ Ltr. at 6.

The government's present assurances as to the narrow scope of COPA cannot rectify its facial overbreadth. The Court should not uphold the Act based on an asserted limiting construction that is at odds with the plain language of the statute. Rather, the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *ACLU*, 521 U.S. at 884. In *ACLU*, the Court reiterated its belief that

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 884 n.49.

3. Limiting COPA to the World Wide Web does not eliminate the interference with the First Amendment rights of adults

No different from its change in the standard for covered speech, Congress' narrowing of the statute to apply only to communication[s] "by means of the World Wide Web" does not render COPA constitutional. The attempt to address the overbreadth problem this Court identified with respect to the CDA by "circumscribing" COPA so that it applies only to the World Wide Web, 47 U.S.C. § 231(a)(1), fails because many Web sites feature newsgroups, chat rooms, or other interactive features that are not susceptible to age screening. *See COPA I*, 31 F. Supp. 2d at 483 (noting existence of interactive Web-based chat rooms, e-mail, and newsgroups). As this Court noted in *ACLU*, "there is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." *ACLU*, 521 U.S. at 855 (quotations omitted).

Even if it were technologically feasible to block minors from materials that are "harmful to minors," the Court found that there is no way to "block their access to that material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent." *ACLU*, 521 U.S. at 856 (quotations omitted). *See also COPA I*, 31 F. Supp. 2d at 483. This problem exists regardless of whether the statute applies to the Internet as a whole or is limited to the World Wide Web. In either case, the regulations will chill protected speech in violation of the First Amendment. *See Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 967-68 (1984) ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.").

4. The affirmative defenses do not cure COPA's defects

The affirmative defenses provided by COPA are essentially identical to those contained in the CDA: A content-provider may attempt to restrict minors' access "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1). This Court has already decided that the availability of these defenses "do[es] not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision." *ACLU*, 521 U.S. at 882. *See also ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999). In fact, this Court acknowledged the impracticability of such defenses for many commercial Web sites, particularly in view of the prevalence of Web sites that provide content free of charge:

> There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited .... Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

ACLU, 521 U.S. at 857 (quotations omitted).

Amici can attest (and the record before the district court affirms) that these realities have not changed. *See COPA I*, 31 F. Supp. 2d at 495 ("implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such material and [] the loss of users to such material may affect the speakers' economic ability to provide such communications"). Requiring credit card or age-verification screening for access to all potentially "harmful-to-minors" material on covered Web sites would severely burden expression, both of users and of content providers. First, would-be recipients of information will be deterred by pre-access screening requirements. The district court found that "consumers on the Web do not like the invasion of privacy from entering personal information" and that "COPA would have a negative effect on users because it will reduce anonymity to obtain the speech . . . resulting in a loss of traffic to Web sites." *COPA I*, 31 F. Supp. 2d at 487, 491. This is consistent with the experience of many *amici* and the Internet industry in general: many Web users will leave a site if required to register. *See id.* at 487 ("[I]n general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase.").

Responding to this concern, the commercial entities that comprise many of *amici*'s constituents have in recent years enhanced and refined their models for doing business on the Web, and the model that is becoming prevalent is the advertiser-supported site that can be accessed by users free of charge. *COPA I*, 31 F. Supp. 2d at 486 ("the most popular business model [on the Web] is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web"). While most sites devoted exclusively to "pornography" do require credit cards or adult verification, advertiser-supported sites are an important part of the array of options available for those seeking more diverse content.

Were advertiser-supported Web sites to employ the adult verification schemes required by the COPA, they would likely alienate many users. By effectively forcing users of the Web to register with the sites they choose to access, implementation of the affirmative defenses will require individuals to disclose personal information (*e.g.*, name, address, social security number, credit card) to a third party prior to being afforded access to constitutionally-protected speech. Reliance on such systems will create records of individuals' First Amendment activities — records that will be available for use and misuse regardless of statutory provisions seeking to protect them.

Conditioning adult access to constitutionally-protected speech on the disclosure of one's identity raises troubling First Amendment and privacy issues. The defenses pose an untenable choice to individuals seeking access to information: protect privacy and forgo access to information, or exercise First Amendment freedoms and forgo privacy. *See ACLU*, 929 F. Supp. at 847 ("adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password").

As the Third Circuit concluded in striking down a law requiring adults to obtain access codes or other identification numbers in order to place a call to a telephone message service:

> [T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions . . . . [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.

Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785-86 (3d Cir. 1990) (citations omitted). *See also ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (analogous state statute violated the First and Fourteenth Amendments "because it prevents people from communicating and accessing information anonymously") (citations omitted), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).[6]

Finally, *amici* note that the price of adult verification has increased since the time of the district court's decision. Specifically, evidence presented to the district court showed that an Adult Check identification number was less than $20 per year; however, a recent visit to the Adult Check Web site reveals that an Adult Check identification number now costs approximately $20 for three months, raising the annual cost to approximately $80.[7]

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6. *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) ("[W]ritten notice requirement[s] will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."); *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n.*, 693 F. Supp. 332, 338 (E.D. Pa. 1988) (access codes impose a self-identification process, which carries with it "the societal opprobrium associated with dial-a-porn messages and the probable undesirability of having one's name and address at the disposal of message providers and other third parties"), *aff'd*, 896 F.2d 780 (3d Cir. 1990).

7. *Amici* respectfully submit that pursuant to Rule 201 of the Federal Rules of Evidence the Court may take judicial notice of the (Cont'd)

The burden is equally severe if viewed from the perspective of the operators of Web sites. As an initial matter, the affirmative defenses provide little comfort in that they do not immunize speakers from criminal prosecution under the Act, but only provide affirmative defenses — on which the speaker will bear the burden of proof — to be asserted following prosecution. As such, they are unlikely to curb the Act's severe chilling effect. As this Court reasoned in *Speiser v. Randall*, 357 U.S. 513 (1958), in holding unconstitutional an analogous procedure that placed an affirmative burden on the speaker of proving that its speech was "legitimate": "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . [which] can only result in a deterrence of speech which the Constitution makes free." *Speiser*, 357 U.S. at 526.

And as Chief Judge Sloviter explained with respect to the CDA:

> [I]t is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as a narrow tailoring. Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, non-profit corporation, or even large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed.

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increased costs of an Adult Check identification number by visiting the Adult Check Web site. *http://secure.adultcheck.com/en/regular/3month_apply.shtml?9999*>(last visited Sept. 19, 2001).

ACLU, 929 F. Supp. at 855-56. *See also COPA I*, 31 F. Supp. 2d at 497 (entering preliminary injunction based in part on COPA's "imposition of possibly excessive and serious criminal penalties" and placement of "the burden of establishing an affirmative defense [on the speaker]").

Moreover, compliance with the affirmative defenses will essentially require Internet purveyors of speech for "commercial purposes" whose sites contain some degree of sexually-frank content to create "adults-only" zones, thereby stigmatizing the speech by equating it with pornography. *See Shea v. Reno*, 930 F. Supp. 916, 943 (S.D.N.Y. 1996) (finding it burdensome for commercial and noncommercial content providers of non-pornographic content, as well as users wishing to access such material, to associate with adult verification services, which are identified with pornographic materials and users of same), *aff'd*, 521 U.S. 1113 (1997); H.R. Rep. No. 105-775, at 26 (1998) ("Credit card verification is commonly used today in both the dial-a-porn and Internet context and it should be easy to use and implement for commercial entities that sell pornography on the Web."). Indeed, as the government's own expert made clear, the Adult Check system advocated by the government is used in connection with "adult entertainment sites." Joint Appendix at 480. In addition, COPA's affirmative defenses would impose an onerous and ongoing burden on *amici* to redesign Web sites in order to segregate "harmful to minors" content.[8] *See* DOJ Ltr. at 3 (recognition of constitutional problems in applying a harmful-to-minors standard to the Internet in view of inherent difficulty in segregating "adult speech" in context of "the dynamic, interactive nature" of this medium).

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8. This burden is particularly onerous in light of the vagueness of the "harmful to minors" standard, as discussed in section I.B.2 above, such that a chilling of protected speech as a result of *amici*'s self-censoring is almost a foregone conclusion.

Finally, Web sites, particularly many created and maintained by *amici*'s constituents, are increasingly employing interactive technology, which permits visitors to communicate with one another in discussion groups and chat rooms, as well as by electronic mail. To the extent the law applies to these features of Web sites, it causes additional burdens. While the employment of interactive technology greatly enhances the First Amendment value of the Internet by permitting listeners seamlessly to transform into speakers and speakers into listeners, implementation of one or more of the verification schemes envisioned by the government will bring such technological strides to a halt.

For one, employment of verification schemes in interactive environments such as chat rooms will destroy the promise of such media of communication by fundamentally interfering with the spontaneity and flow of dialogue that occurs within them. Further, those who sponsor such fora on their Web sites (as do many of the entities represented by *amici*), faced with the costly and difficult prospect of monitoring the speech occurring on them and the concomitant risk of prosecution under the Act for allowing ill-defined "harmful to minors" speech to transpire, necessarily will think twice about offering such fora. *See COPA I*, 31 F. Supp. 2d at 495 ("there is no way to restrict the access of minors to harmful material in chat rooms and discussion groups . . . without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors").

These profound shortcomings of COPA's affirmative defenses leave *amici*'s speech sponsors, who are representative of many other Internet speakers, with two equally untenable alternatives: (1) offer speech that is unquestionably constitutionally-protected as to adults but which may be construed as "harmful to minors," and thereby risk criminal prosecution and civil penalties under COPA;

or (2) suppress such speech by self-censorship, thereby denying adults access to constitutionally-protected material. Requiring *amici*'s constituents to face this dilemma is antithetical to fundamental First Amendment principles.

C. COPA Is Not the Least Restrictive Means of Protecting Minors from "Harmful to Minors" Material on the Internet

In *ACLU*, the government attempted to meet its burden of proof by relying on "the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communications." *ACLU*, 521 U.S. at 876. As was the case in *ACLU*, this argument must fail here because the decentralized nature of the World Wide Web allows entrée to *all* of the publicly-available information to anyone with Web access. There simply is no way for a content-provider to ascertain whether a particular computer is being operated by an adult or by a minor. Any attempt to protect minors from exposure to a particular type of speech therefore necessarily must take the form of removing targeted speech from the domain of free public accessibility. Accordingly, COPA fails strict scrutiny because it is not narrowly-tailored. Notwithstanding its recognition that blocking or filtering software is "not perfect" in that it is both under- and over-inclusive in the material it blocks and filters, the district court noted that

> blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means.

COPA I, 31 F. Supp. 2d at 497. Several other courts have also recognized that less restrictive alternatives exist.

See, e.g., PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 625 (W.D. Va. 2000) ("Less intrusive and more effective means of limiting online access by children to adult materials are widely available to parents and other users who wish to restrict or block access to online sites . . . that they feel are inappropriate."); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 750-51 (E.D. Mich. 1999) (noting the availability to parents of screening software and taking "judicial notice of the fact that every computer is equipped with an on/off switch"), *aff'd*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 4 F. Supp. 2d at 1033 ("Commercial online services . . . provide parents with a wide range of mechanisms that parents can use to prevent their children from accessing material online they do not want their children to view). *See also Playboy*, 529 U.S. at 826 (holding that law restricting hours that cable channels may offer sexually explicit programming was not narrowly-tailored, in part because the government "has not shown that . . . a regime of added communication and support [instead of completely blocking the channels during certain hours], would be insufficient to secure its objective").

In addition, the district court identified aspects of COPA itself that Congress could have made less restrictive:

> [T]he sweeping category of forms of content that are prohibited – "*any communication*, picture, image, graphic image file, article, recording, *writing*, or *other matter of any kind*" . . . could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instance, only pictures, images, or graphic image files, which are typically employed by adult entertainment Web sites as "teasers."

COPA I, 31 F. Supp. 2d at 497 (emphasis in original). The existence of these less restrictive alternatives necessarily means that COPA is not "narrowly tailored."

Further, as the court of appeals noted, COPA is of limited utility in accomplishing its goal of protecting minors because it "would not eliminate much of the harmful material which a minor could access," such as material published by noncommercial Web publishers and by foreign Web publishers. *COPA II*, 217 F.3d at 177 n.21. For these reasons alone, COPA does not pass constitutional muster.

* * *

Amici submit that COPA is unconstitutional because it presents a content-based restriction on speech that is not narrowly-tailored to advance a compelling government interest. Rather, COPA suffers the same constitutional flaws that its predecessor statute, the CDA, suffered. Therefore, this Court need not reach the grounds relied upon by the court of appeals in order to find that a preliminary injunction was properly granted.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT COMMUNITY STANDARDS ARE UNWORKABLE ON THE INTERNET

The court of appeals found that COPA fails strict scrutiny on several grounds, including its imposition of "an overreaching burden and restriction on constitutionally protected speech." *COPA II*, 217 F.3d at 177. However, the court's holding rested on the conclusion that "COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability." *Id.* at 166. Although, as noted, this Court need not reach the "community standards" issue in order to strike down COPA as a facial violation of the First Amendment, the court of appeals was right to highlight this problematic aspect of

Congress' attempt to impose the "harmful to minors" test on the World Wide Web.[9]

The court of appeals pointed out that this Court in *ACLU* had noted the problematic nature of "community standards" on the Internet — namely, that "any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message," 521 U.S. at 877-78 — and that it did not believe COPA had sufficiently remedied this problem. *See COPA II*, 217 F.3d at 174. *Amici* agree with that assessment.

The government's assertions that "there is every reason to expect to expect a far greater degree of agreement from community to community concerning what appeals to the prurient interest and is patently offensive with respect to minors" than with respect to what is obscene for adults, Pet. Br. at 38, and that community standards are likely to be "reasonably constant" throughout the country, *id.* at 37 (*quoting* H.R. Rep. No. 775 at 28), are pure speculation, as well as being counterintuitive. Notably, in *Miller v. California*, 413 U.S. 15, 32-33 (1973), this Court adopted a "local," rather than a "national," community standard test for obscenity based on recognition that standards vary from state to state, and that the people of Maine should not

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9. The court of appeals recognized that "in focusing on the 'contemporary community standards' aspect of COPA [it was] affirming the district court's ruling on a ground other than that emphasized by the district court." *COPA II*, 217 F.3d at 174 n.19. However, the court of appeals did not, as the government contends, reject the district court's recognition that less restrictive alternatives for furthering the government's interest in protecting minors exist. *See* Pet. Br. at 14. Rather, the court of appeals recognized that it was pioneering new legal terrain — noting that "no federal court has yet ruled on whether the Web/Internet may be constitutionally regulated in light of differing community standards" — but chose to rest its decision on the "community standards" aspect of the law. In so doing, it pointed to an alternative basis for finding that COPA violates the First Amendment.

be required to accept sexually-explicit material found tolerable in Las Vegas or New York City. This reality takes on particular significance in the context of the Internet, given the inability of Web site operators to geographically restrict their content.[10]

It is, therefore, not the case that there is nothing unreasonable about requiring a "person who chooses to conduct a nationwide business" – a Web site operator – to "observe community standards throughout the nation." Pet. Br. at 30. In contrast to the owner of a physical store, for example, a content provider on the World Wide Web has no reasonable means of controlling or preventing minors from particular communities from gaining access to material made available to the public through Web sites. *See ACLU*, 521 U.S. at 877. Each case relied upon by the government arose in a context in which the nature of the communication made compliance with local community standards feasible. *See, e.g., Sable*, 492 U.S. 115 (not unconstitutional to require operator of dial-a-porn business to comply with varying community standards); *Hamling v. United States*, 418 U.S. 87 (1978) (affirming conviction under federal statute for mailing obscene brochure and noting that federal obscenity statute need not be interpreted as requiring proof of uniform national standards); *Miller*, 413 U.S. 15 (state may regulate mailing of sexually-explicit brochure if work meets tripartite test); *United States v. 12 200-Foot Reels of Super 8 M.M. Film*, 413 U.S. 123 (1973) (holding constitutional a statute proscribing the importation of obscene motion picture even though the material was for the importer's private, personal use and possession); *Roth v. United States*, 354 U.S. 476 (1957) (affirming conviction under federal statute for mailing

10. Even if community standards were "reasonably constant" from state to state, this would offer little comfort to Web users, for even the existence of *some* variation from community to community will impose on Web speakers the impossible burden of ensuring that all of the material they disseminate conforms to the most restrictive standard.

obscene matter).[11] In the context of the Web, by contrast, where such compliance is not presently feasible, the First Amendment does not permit the government to require *amici*, who are engaged in the "business" of disseminating expression nationwide, to curtail this expression to conform to the lowest community denominator of what is suitable for minors.

The government further attempts to rescue COPA by analogizing it to constitutionally accepted state display laws, claiming that "Congress adopted the same basic approach for the Web that states have adopted for local stores." Pet. Br. at 25, 27. But the inability of Web site operators to limit access of minors to their content, without depriving adults of the same material, means that standards that may pass constitutional muster in the physical world cannot be transposed into cyberspace without creating a constitutionally intolerable effect:

> Magazines or brochures can be brown bagged or hidden in the backroom of purveyors. With the Internet, you would have to 'close the bookstore' because the disseminator and the recipient are not face to face. A magazine can be regulated or censored by the county in which it is located. A person's age can be verified because that person is physically there, and the disseminator can logically be held responsible for conveying "sexually explicit matter" to a minor. The Internet

11. *See also United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (application of community standards to electronic bulletin board upheld where access was limited to members who were given a password after submitting a signed application that required applicant's age, address, and telephone number); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (statute prohibiting sale or display in unsupervised sidewalk vending machine located in a public place); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986) (requiring display of harmful-to-minors material in sealed wrapper).

> does not distinguish between minors and adults in their audience. To comply with the Act, a communicant must speak only in language suitable for children.

Cyberspace Communications, 55 F. Supp. 2d at 747.[12]

Thus, the court of appeals was correct in concluding that the unique attributes of the Web render unworkable the community standards that have been upheld for communications in other media. A contrary conclusion would force content providers to sanitize their communications "to that which is fit for a sandbox" in accordance with the most restrictive community standards or refrain altogether from engaging in certain valuable speech rather than run the risk of contravening a local prosecutor's notion of what is "harmful to minors."

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12. In fact, at least one court has justified a ban on student access to material deemed inappropriate for them because the prohibited material is available on the Internet. *See Newton v. Slye*, 116 F. Supp. 2d 677, 682 n.3 (W.D. Va. 2000) ("students having an interest in reviewing any of the titles of the books, or even the books themselves . . . may view such lists through computers utilizing on-line ordering via Internet web sites of companies like Amazon.com").

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that COPA is an unconstitutional restraint on free speech and that the entry of a preliminary injunction should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: *THE AMICI*

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment. For AAP's members, the Internet creates a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content online. AAP's members are eager participants in this exciting new marketplace.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. Founded more than seventy-five years ago to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people, ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

Appendix

The Center for Democracy and Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user-empowerment tools and technologies.

The Comic Book Legal Defense Fund ("CBLDF") is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based, and online commerce in comics is steadily increasing. Past experience has shown that comics are particularly vulnerable to misapplication of "harmful-to-minors" standards as they are commonly perceived as an inherently juvenile art form. In reality, however, many comics are read by and geared to an adult audience. The CBLDF, therefore, fears that COPA would have a chilling effect on its many members who continue to explore and evolve the comic book art form.

Appendix

The Computer & Communications Industry Association ("CCIA") is an international trade association whose members include major, midsize, and small independent software providers, computer equipment manufacturers, telecommunications and online service providers, resellers and systems integrators. CCIA's members collectively generate approximately $250 billion in revenue annually and have approximately one million employees. For twenty-six years, CCIA has advocated open, barrier-free competition in the computer and communications industry.

The Freedom to Read Foundation ("FTRF") is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens. The FTRF and its library members serve both as access and content providers on the Internet. Many member libraries post a diverse array of content on their Web sites, as well as sponsor chat groups. In view of past attempts by some persons to ban literature and reference items from library collections, many of the FTRF's members fear prosecution under COPA should they post materials on the Internet that might be deemed "harmful to minors" in some community. The FTRF is thus concerned that the library patrons served by the FTRF's members will be denied access to constitutionally-protected materials.

The National Association of Recording Merchandisers ("NARM") is a not-for-profit trade association founded in 1958 which serves the music retailing

community in the areas of advocacy, networking, information, education, and promotion. The Association's more than 1,000 members include retailers, wholesalers, distributors, and suppliers of products and services, many of whom conduct business over the Internet. Some of NARM's members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

Newspaper Association of America ("NAA") represents the interests of more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for eighty-seven percent of the U.S. daily circulation. Many of these newspapers are currently on the Internet. A strong advocate of the press' First Amendment rights, NAA is particularly concerned with protecting the free flow of information over the Internet.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who distribute their wares through independent national distributors, wholesalers, and retailers, many of whom conduct business over the Internet.

The Publishers Marketing Association ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's

members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired. A number of PMA members have developed Web sites which offer book samples, chat rooms, and other fora for the discussion of their publications. The Internet is an essential tool for marketing and disseminating the unique voices represented by PMA's members and often is a significant source of their publishing income. The imposition of criminal sanctions for communications containing materials deemed "harmful to minors" is a real and tangible threat to these independent publishers, who provide a rich alternative to mainstream publishing houses. The PMA believes that the use of credit card and other user-identification systems defeats the purpose of this democratic medium by discouraging the informal perusal of works otherwise not accessible to the majority of Internet users.

The Recording Industry Association of America ("RIAA") is a national trade association whose member companies produce, manufacture, and distribute more than ninety percent of the sound recordings sold in the United States. The RIAA is committed to protecting its members' free expression rights across all communications media, including the Internet.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior.

Appendix

Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press across all mediums, including the Internet.

No. 00-1293

Supreme Court, U.S.
FILED
SEP 20 2001
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 2000

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

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LIST OF *AMICI CURIAE*:

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ALL PARTIES CONSENT TO THE FILING OF THIS *AMICUS* BRIEF

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Respondents.

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

After this Court held in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the Communications Decency Act ("CDA") unconstitutionally infringed on the First Amendment rights of adults, Congress tried to accomplish its goal of protecting minors from sexually explicit online speech by enacting the Child Online Protection Act of 1998 ("COPA"), 47 U.S.C. § 231. However, although the wording of COPA is narrower than that of the CDA, it suffers from the same constitutional flaw as its predecessor: it still restricts Internet speech available to adults to only that which Congress believes is appropriate for children. As a result, *amici* – most of whom also filed an *amicus* brief in *Reno* – submit this brief to urge the Court to affirm the holding of the United States Court of Appeals for the Third Circuit that COPA impermissibly infringes rights protected by the First Amendment.[1]

1. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae* and

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are businesses, organizations, and individuals that use the World Wide Web to engage in speech and other forms of expression on wide-ranging subjects and who require and believe firmly in freedom of expression in connection with their use of the Web. Some are individuals (or organizations representing individuals) for whom the World Wide Web provides an unprecedented opportunity to publish and disseminate speech on issues that they consider important. One is an educator and consultant who uses the World Wide Web for both teaching and research. Another is an art gallery owner that uses the World Wide Web to display his current exhibitions. A complete list of *amici*, with descriptions of their uses of the World Wide Web, their interest in this litigation, and the impact that enforcement of COPA would have on their varying uses of the Web, is set forth in a more detailed Statement of Interest of *Amici Curiae* that is appended to this brief. *Amici* have a unique ability to illustrate one of the fatal flaws in COPA: its overbreadth. As users of the World Wide Web, *amici* are directly affected by the deterrence of speech that COPA's overbreadth causes.

SUMMARY OF ARGUMENT

COPA imposes criminal and civil penalties for any communication on the World Wide Web that includes material deemed "harmful to minors" if the communication is related to a commercial purpose. 47 U.S.C. § 231(a)(1). COPA's definition of what is "harmful to minors" is broad enough to encompass material that has legitimate First Amendment value for adults. The congressional attempt to correct the deficiencies of the CDA

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their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent are being lodged with the Clerk.

thus fails because COPA again criminalizes valuable and constitutionally protected speech in a broad sweep that is not narrowly tailored to achieve Congress' stated justification. The statute cannot achieve its stated ends without simultaneously inhibiting or prohibiting *amici*'s constitutionally protected and socialiy valuable speech. The statute therefore is unconstitutionally overbroad. The purpose of this brief is to illustrate COPA's overbreadth as it applies to *amici* and others like them.[2]

ARGUMENT

In Criminalizing Speech that is Appropriate for Adults, COPA Is Unconstitutionally Overbroad.

A statute violates the First Amendment when it proscribes more speech than is necessary to further a compelling governmental interest. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A classic example of such unconstitutional overbreadth is a law that allows adults to receive or engage in only speech that is deemed fit for children. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2426-27 (2001); *Reno*, 521 U.S. at 874; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755, 760 (1996); *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). COPA is just such a statute.

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2. To illustrate COPA's overbreadth, this brief cites web pages of *amici* and others that may be endangered by the statute. For the Court's convenience, *amici* are lodging with the Clerk a compact disk that contains an electronic version of this brief in portable document format (.PDF). The citations to web pages on that disk are hyperlinked to cached copies of the cited web pages that are included on the compact disk. All of those web pages were cached to the disk on September 13-17, 2001, and *amici*'s citations are intended to be to the versions of those web pages as they existed on that date.

Amici do not challenge Congress' asserted interest in seeking to protect children from harmful material on the Internet. But even if the interest in protecting children from pornography is substantial, it cannot justify COPA's content-based restriction of speech for adults.[3]

A. COPA's Language Fails To Protect Against Prosecution of Speech That Is Valuable for Adults.

The Government's brief accurately states that a major congressional objective behind COPA was to eliminate

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3. This brief does not focus on the availability of means less restrictive than COPA's broad criminalization of speech to satisfy Congress' objective. Nevertheless, the lack of Congressional efforts to find alternatives is startling. One Senator complained: "The Congress has made only the most minimal efforts to determine whether technical tools or this measure would be the least restrictive means of protecting children. There has been no study, no discussion, and no comparison of the effectiveness of various approaches, their likely impact on speech, and their appropriateness for the Internet." 114 Cong. Rec. S. 12741, at S12795 (remarks of Sen. Leahy). At the time it enacted COPA, Congress established a Commission on Online Child Protection to study methods of reducing minors' access to harmful material on the Internet. COPA § 1405, 112 Stat. 2681-736. To no avail, the Justice Department urged Congress to await the Commission's report before enacting a new criminal statute. *See* 114 Cong. Rec. S 12741 *et. seq.* (Oct. 5, 1998 letter from Justice Dept., Off. of Leg. Affairs, to Sen. Commerce Comm. Chairman Bliley). Congress did not fund the Commission, and, because of delays appointing its members, the unfunded Commission had to work on a compressed schedule. It nevertheless evaluated various technological solutions available, including those relating to the credit-card and age-verification defenses ratified in COPA, and concluded that alternative measures, such as home filtering applications, were more effective and less restrictive. Comm. on Child Online Protection, Report to Congress (Oct. 20, 2000), *http://www.copacommission.org/report/COPAreport.pdf*.

"teasers" for pornographic pictures from material accessible to minors. *Amici* do not publish such material or seek access to it. But *amici* reasonably believe, and the courts below have agreed, that COPA does not have such a narrow reach. COPA makes it a crime to publish a broad range of material on the World Wide Web and, as the district court noted (Pet. App. at 94a-95a), is not limited to just the images found in "teasers." COPA criminalizes (with a $50,000 fine, imprisonment for up to six months, or both) "*any* communication for commercial purposes that is available to *any* minor and that includes *any* material that is harmful to minors." 47 U.S.C. § 231 (emphasis added).[4]

The brief by Members of Congress John S. McCain, *et al.* (at pp. 4, 13) asserts that "the courts below did not *find* COPA unconstitutional, they *made* it unconstitutional" by interpreting it too broadly. But the courts below had to deal with the statute as written, not as the Government and its *amici* would have liked it to have been written. There is no reason to believe that the four federal judges who concluded that COPA sweeps too broadly set out deliberately to give COPA an unconstitutional scope. In issuing the injunction, Judge Reed went out of his way to express his "personal regret" that the statute was invalid (Pet. App. at 96a-97a), and Circuit Judge Garth, joined by Judges Nygaard and McKee, echoed Judge Reed's sentiments (*id.* at 38a).

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4. COPA states: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both." 47 U.S.C. § 231(a)(1). The rest of Section 231(a) provides for increased fines for intentional violations and allows for civil penalties.

Congress tried in COPA to remedy constitutional flaws that this Court identified when it struck down the CDA in *Reno*, but its effort did not succeed. Insofar as is relevant here, there are two main differences between COPA and the CDA. First, COPA is limited to material published "for commercial purposes." Some of these *amici* are non-profit organizations that adhere strictly to guidelines under federal and state law for maintenance of that status. If COPA had removed from its application all such organizations as defined, for example, by the Internal Revenue Code, 26 U.S.C. § 501(c), publishers would have welcomed that bright-line defense and been able to proceed with some assurance that their publications were not vulnerable to criminal prosecution.

But COPA contains no such exception. Rather, its convoluted definition of the "commercial purposes" needed for liability mixes ideas about whether the publisher "devotes time, attention, or labor" to making communications, has an "objective" of making a profit "as a result of such activities," does or does not necessarily make a profit, does or does not necessarily lack other sources of income, and knowingly posts or solicits material for publication.[5] This definition is so unclear that *amici*

5. The definitions in Section 231(e)(2) provide:

> (A) COMMERCIAL PURPOSES. – A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.
>
> (B) ENGAGED IN THE BUSINESS. – The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

have no assurance that they are not covered by it if, for example, they allow sponsorships on their web pages, share receipts from sales made by partners under linking agreements, or solicit contributions to fund their web sites – even though such activities strictly conform to the tax guidelines for non-profits. Both the district court and court of appeals held that the members of the organizational plaintiffs in this case have standing because their fears of prosecution are not unreasonable – even though some of them are non-profit entities. Pet. App. at 16a, 50a-54a.

COPA's second major change from the CDA is that the statute bans only material that meets a three-part test defining what is "harmful to minors."[6] To be sure, this

6. COPA states:

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, prurient interests;

definition is more specific than the exceptionally vague proscription of "indecent" and "patently offensive" material in the CDA, but that is faint praise indeed.

The Government argues that "the harmful-to-minors test . . . narrowly cabins the material that is covered by the Act," particularly because the third prong of the test (a requirement that the material lack serious literary, artistic, political, or scientific value for minors) "significantly circumscribes" what may be prosecuted as a matter of law. Pet. Br. at 33-34. Warming to this theme, the Government's Congressional *amici* (at pp. 8 & n.2, 23-27) insist that judicial decisions prevent any overly broad application of COPA to most sexually-related speech on the Web. But, of course, those same judicial decisions applied to the CDA and still did not save it from unconstitutionality. Court decisions have established no nationally uniform standard of what is "harmful to minors" — an objective undermined by the very subjectivity of the concept. Even if the third prong of the statute's definition removes some material from the vagaries of juries, the *legal* question whether various types of materials have "serious . . . value for minors" is far from clear.

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). Unlike the CDA, which proscribed all types of Internet communications, COPA is limited to communications using the World Wide Web (that is, Internet material accessible through the hypertext transfer protocol) and relates only to material available to "minors" under 17 years of age. *Id.* § 231(e)(1), (7).

One of the main cases on which the Government and its *amici* rely, *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383 (1988), illustrates the problem. Both the district court and the court of appeals in that case reasonably believed that the Virginia statute before them made it a crime to exhibit to juveniles any of the 16 books placed into evidence. On certiorari, this Court found that question so unclear that it certified it to the Supreme Court of Virginia, the only authoritative arbiter of the statute's scope. The Virginia Supreme Court then reviewed each of the books and concluded that they "vary widely in merit" but had "serious . . . value for a legitimate minority of normal, older adolescents" and therefore were not in violation of the statute. *Virginia v. American Booksellers Ass'n.*, 236 Va. 168, 177, 372 S.E.2d 618, 624 (1988).[7]

COPA is a federal statute of nationwide application, and the only tribunal that can authoritatively say whether a work is punishable under it is this Court. Even assuming that this Court, through frequent grants of certiorari, were willing to undertake that task for the myriad of sexually explicit works on the World Wide Web, the economic and other resources necessary for small web publishers to

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7. The source of the Virginia court's "normal, older adolescents" standard is unclear, as are its implications with respect to younger children, and it is unclear whether the Government's brief advocates it. *See* Pet. Br. at 34-35. The Congressional *amici* say (p. 23) that COPA should bar speech inappropriate for "minor children of the intended and probable age groups to which it is exhibited." But COPA's proscription applies to communications that are "available to *any* minor" (§ 231(a)(1)); it makes no age distinctions. Following the Virginia Supreme Court's construction, the constitutionality of the Virginia statute was upheld by the Fourth Circuit, but an extension of the statute to Internet communications has since been enjoined because web publishers are unable to distinguish between adults and minors (of whatever age) in their audience. *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

obtain such an authoritative declaration will deter most of them from seeking that relief. There is no readily available *American Booksellers*-type certification solution for them to employ. As a result, they must choose either to risk prosecution or to err on the side of limiting what they publish.

The differences between COPA and the CDA therefore do not make COPA constitutional. Rather, far more important than these differences is the key *similarity* between COPA and the CDA. Like the CDA, COPA applies to all content that is "available to any minor," and on the Web there is no reliable way for content providers to distinguish between what is available to minors and what is available to adults unless they implement screening measures that themselves will deter speech. Pet. App. at 89a-90a. The only viable option is for content providers to restrict all speech on the Web to that deemed by courts (or prosecutors) to be appropriate under COPA for minors. This similarity between COPA and the CDA, grounded in the very nature of the medium Congress sought to regulate, renders the narrowing distinctions between the statutes ultimately fruitless in overcoming COPA's overbreadth.

While *amici* do not believe that they publish material that is "harmful to minors," they do believe that some of their publications and others like them — which include material of legitimate value for adults (and, in many cases, for children too) under the First Amendment — may be within the reach of COPA. The remainder of this brief discusses some of that threatened material from *amici*'s own web sites or from similar sites published by others to demonstrate the wealth of Web content, far outside the realm of commercial pornography, that is within COPA's overbroad ambit.

B. COPA Is Overbroad Because It Restricts Information About Sexual Health.

To be "harmful to minors," a web communication must depict, describe, or represent a sexual act or sexual contact or must exhibit genitals or a post-pubescent female breast. 47 U.S.C. § 231(e)(6)(B). That requirement can encompass a broad range of sexual information, from basic education about procreation, to "safe sex" instructions for prevention of pregnancy or sexually-transmitted diseases, to health information about gynecological or urological issues. A wealth of such information is available on the World Wide Web.[8]

The Government appears to argue that there can be no question that such information has serious value for minors, so that there is no way that its communication can

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8. *See, e.g.*, Safersex.org, "Condoms!: A Simple Guide to Latex Dams," *http://www.safersex.org/barriers/dam.html* (information by *amicus* Safersex.org on safe sex practices); HIVChannel, "Safe Sex," *http://www.hivchannel.com/prevention/safesex/index.shtml* (information about safe sexual activity for individuals who are HIV positive); The Body, "Ask the Experts About Safe Sex, Prevention & Transmission," *http://www.thebody.com/Forums/AIDS/SafeSex/index.html* (answers to questions concerning safe sex practices); JAMA HIV/AIDS Resource Center, "Treatment Guidelines: Sex and HIV Prevention," *http://www.ama-assn.org/special/hiv/treatmnt/guide/hivguide/hivguid5.htm* (*AMA Journal* site describing safe sex practices); Salon.com, "Sex slave," *http://www.salon.com/sex/feature/2001/05/07/prostate/* (wife's account of coping with husband's sexual dysfunction following prostate surgery); ThriveOnline, "Sexuality," *http://thriveonline.oxygen.com/sex/* (reproductive health); ThriveOnline, "Testicular Self-exam," *http://thriveonline.oxygen.com/medical/medicaltests/test.testicleself.html*; The Male Genitalia Guide, "Testicular Self-exam," *http://www.afraidtoask.com/members/testicle.html*.

be prosecuted under COPA. *Amici* certainly hope that is true, though the result is far from clear. Many segments of today's society deplore the dissemination of sexual information to minors and consider any sexual practices by minors (or any unmarried persons) sinful, and thus "harmful" *per se*. *See generally* "Americans Search for New Sexual Ethic," *San Francisco Chronicle*, p. A1 (Nov. 29, 1994) (noting disapproval of teenage sex among Baptists, Buddhists, Catholics, Methodists, Mormons, Muslims, and Jews, among other religions, despite changing social mores). In this atmosphere, a threat of prosecution cannot automatically be dismissed. But even assuming that some information about sex is protected, there are categories of such information that may be far more vulnerable than others. Consider the following:

Information about obtaining sexual pleasure. Heterosexual sex is respected in all cultures as an act of procreation. But sexual contact also is a source of intense physical pleasure. From time immemorial, men and women have explored ways to fulfill and enhance their sexual feelings —from experimentation with love potions and aphrodisiacs, to invention of new techniques and positions, to study of anatomical and physiological sources of stimulation. All of this information has value for adults. For example, medical professionals frequently have acknowledged the emotional and psychological importance of sexual satisfaction to healthy relationships. *See, e.g.*, D. Satcher, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior: A Letter From the Surgeon General*, U.S. Dept. of Health and Human Services, at 2 (July 9, 2001), *http://www.sg.gov/library/sexualhealth/call.pdf*. *See also* Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* §§ 302.71, 302.79 (1994).

The World Wide Web is a significant source of information about ways of obtaining sexual satisfaction.[9] But does such information have serious value for minors? Any hedonistic view of sexuality is a source of moral disapproval among large segments of the American public, and transmission of such information to children therefore may be viewed by many as no better than transmission of disease. While a prosecutor might well find value for minors in instructing about how to prevent AIDS or how to do self-examinations for breast or testicular cancer, he or she may not agree on the value of instructions on how to provide pleasure to another young man or woman on date night. The web sites providing legitimate information about sexual satisfaction therefore are threatened.

Sexual devices and related topics. Just this year, the Eleventh Circuit considered the constitutionality of an Alabama statute that makes it unlawful to distribute (but not to possess or use) "any device . . . useful primarily for the stimulation of human genital organs." *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001). The court noted expert opinions that such devices are used for "standard medical and psychological purposes," including "marital and non-

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9. *See, e.g.*, QuickCondoms.com, "Ask the Sexpert: How to Find the G-Spot," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=73*; A. Cadell, "Give Your Man the Massage of His Life," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=125*; S. Gardos, "Dear Dr. Gardos," *http://thriveonline.oxygen.com/sex/experts/drgardos/drgardos.03-07-01.html*; iVillage.com, "Sex Coach: Techniques for Sensational Sex," *http://www.ivillage.com/relationships/experts/sexcoach/articles/0,9632,166929_25676,00.html*; Body Positive, "Sex for People Living with HIV," *http://www.thebody.com/bp/hivsex.html* (site discussing how HIV-positive individuals can enjoy safe, pleasurable, sexual activities); iVillage.com, "Orgasm," *http://www.ivillage.com/topics/relation/sex/0,10707,166919,00.html* (website oriented towards women, articles and answers to online questions about how to engage in pleasurable sexual activities).

marital sexual relationship counseling," and it remanded to determine whether the ban unconstitutionally infringed on the rights of adults challenging the statute. 240 F.3d at 947, 955-56. But the court rejected a facial challenge to the law because, at least as applied to distribution to minors, the statute rationally advanced Alabama's interest in maintaining public morality by discouraging "prurient interests in autonomous sex" and "auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships." *Id.* at 949 (quoting Alabama brief and district court opinion), 954-55.

Williams adequately frames the issue here. Whatever the ultimate judicial outcome on the adults' challenge to the Alabama statute, the fact remains that, as the court in *Williams* acknowledged, there is a legitimate basis for providing information to adults across the nation about therapeutic sexual devices.[10] The First Amendment would not permit that information to be banned. But, at least in the view of the Eleventh Circuit, there is no legitimate reason for minors to have access to such devices, and therefore it may be that the Eleventh Circuit would hold that there is no serious value in providing information about such devices to minors. Under that view, COPA therefore

10. Only a handful of states have statutes like that in Alabama. *See, e.g.*, Colo. Rev. Stat. § 18-7-101; Ga. Code Ann. § 16-12-80; Kan. Stat. Ann. § 21-4301; La. Rev. Stat. Ann. § 14:106.1; Miss. Code Ann. § 97-29-105; Tex. Penal Code Ann. § 43.21, 43.23; Va. Code Ann. § 18.2-373. Courts have been divided on their constitutionality. *See, e.g., People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (statute proscribing "obscene devices" impermissibly burdened right to privacy); *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (same); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985) (statute did not infringe privacy rights); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (statute valid).

would restrict adults' access to this legitimate information.[11]

The discussion in *Williams* points to a related category of threatened sexual information that is available online: that dealing with auto-erotic behavior.[12] There should be

11. Separate from the question of therapeutic sexual devices is that of sexual physical enhancements. Whether for therapy, accident reconstruction, or simple vanity, many Americans undergo procedures or treatments each year for such things as breast augmentation or penile enlargement, and the Web is full of sites about the processes. Some of those sites even contain before-and-after photos and pictorial testimonials. *See, e.g,* G. Rheinschild, "Case studies," *http://www.maleenhancement.com/gwr-case_studies.html;* Implantforum.com, "All About Breast Augmentation: Breast Implant Before and After Photos," *http://implantforum.com/pics/pics.html*. Adults have a right to information about these procedures. As the Court said with respect to tobacco sales in *Lorillard*, 121 S. Ct. at 2426, "it is no less true that the sale and use of tobacco products by adults is a legal activity" and therefore "[w]e must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." If, on the other hand, this information is not of serious value for minors, COPA would prevent adults from receiving it. In *Lorillard*, the Court held that, despite the state's interest in protecting against underage tobacco use, such a result was impermissible for information about smokeless tobacco and cigars. The same must hold true for lawful medical information.

12. *See, e.g.*, J. Blank, "Celebrating Masturbation," *http://thriveonline.oxygen.com/sex/sexpressions/masturbation.html;* iVillage.com, "Masturbation," *http://www.ivillage.com/topics/relation/sex/0,10707,166917,00.html* (women-oriented web site); HIV and You, "Safer Sex: Vibrators," *http://www.hivpositive.com/f-HIVyou/4-SaferSex/4-Vibrators.html*. The web presents a ready source that users may consult anonymously to obtain knowledge

little doubt that many would bar such information from minors. In 1994, the Surgeon General was forced to resign because she said that masturbation was "part of human sexuality and it's a part of something that perhaps should be taught" in connection with comprehensive health education.[13] Yet, there also should be little doubt that it is a topic of legitimate value. *See* Gina Kolata, *The Rule Dr. Elders Forgot: America Keeps Onan in the Closet*, N.Y. Times, Dec. 18, 1994, Sec. 4, p. 5 (reporting survey findings that about 60% of adult males, 40% of adult females, 90% of teen-age boys, and 65-70% of teen-age girls had masturbated within year preceding article). If *Williams* is correct that a state has a legitimate interest in preventing autoerotic conduct, at least by minors, it may follow that minors can be barred from receiving information about it. That would cloak such information from adults as well.

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about such a private topic. For one example of an anguished teenager's inquiry to a university web site inviting questions about health topics, *see* Go Ask Alice!, "Bed Humping = Bad Habit?," *http://www.goaskalice.columbia.edu/1720.html* ("I've had a 'bed humping' problem for almost three years now. . . . This web site seems like the only place that can help me right now. I can't talk to any of my family or friends about it. It would be too embarrassing, and I would be afraid. . . . Am I a weirdo or a pervert for doing it?").

13. *See* Center for Reproductive Law and Policy, "On the Hill: Surgeon General Resigns Under Pressure from White House," Reproductive Freedom News, Dec. 16., 1994, vol. III, No. 22, p. 5-6; Evelyn C. White, "Grace Under Fire," San Francisco Chron., May 21, 1995, at M3 (interview with Dr. Joycelyn Elders). *See also* "Simi Valley Church's Program Shocks Some in Community," Associated Press, Mar. 18, 2001 (available on LEXIS; controversy caused by California church program teaching high school-age minors about sexual topics, including masturbation).

Non-traditional sexual practices. Fifteen years ago, this Court upheld against constitutional challenge a Georgia law proscribing consensual sodomy (oral or anal intercourse). *Bowers v. Hardwick*, 478 U.S. 186 (1986). In a concurring opinion, Justice Powell listed two dozen states that had such laws. *Id.* at 198 n.1. Since that time, twelve of those laws have been rescinded or deemed inapplicable to consenting adults, many by legislative action and a few (including that in Georgia) by state judicial decisions. The conduct is now officially lawful for adults in about three-fourths of the country. *See* Lambda Legal Def. & Educ. Fund, "State-by-State Sodomy Law Update," *http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275*.[14]

In December 2000, the Centers for Disease Control and Prevention reported that "oral sex is commonly practiced by sexually active male-female and same-gender couples of various ages, including adolescents." "What You Should Know About Oral Sex," *ftp://cdcnpin.org/Updates/oralsex*.

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14. Although reported prosecutions are extremely rare, eleven states still criminalize such conduct between any consenting adults. *See* Ala. Code § 13A-6-65; Fla. Stat. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89 (constitutional challenge pending); Mass. Gen. Laws Ann., ch. 272, §§ 34, 35; Minn. Stat. § 609.293; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah CodeAnn. § 76-5-403; Va. Code Ann. § 18.2-361. Three more criminalize it only for homosexuals. *See* Kan. Stat. Ann. § 21-3505; Okla. Stat. Ann. title 21 § 886; Tex. Penal Code Ann. § 21.06 (constitutional challenge pending). The varying ways in which these states have treated this issue, particularly when contrasted with the states that have not criminalized such conduct at all, underscore local differences on these issues and demonstrate the local nature of the "community standards" inquiry under COPA. Because web sites cannot limit or control their reach geographically, the way a paper publisher may, they are especially vulnerable to differing "community standards" analyses when they deal with topics like these.

PDF. The report warned of misconceptions regarding the practice, including the fact that many adolescents (perhaps influenced by news reports during the Lewinsky controversy) "do not consider it to be sex" and "therefore they may use oral sex as an option to experience sex while still, in their minds, remaining abstinent." *Id.* The report warned further of risks of transmission of the AIDS-causing virus HIV if the practice is not followed safely. *Id.*

Numerous web sites provide information about oral and other non-vaginal sexual conduct, including instructions and safety pointers.[15] Clearly, this is legitimate health information for many adults. Just as clearly, however, this entire subject is repulsive and anathema to others. As the Supreme Court of Georgia noted when it struck down the law considered in *Bowers*, "many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible." *Powell v. State*, 270 Ga. 327, 335, 510 S.E.2d 18, 26 (1998). States that have legalized these practices have done so only if there is consent, and minors usually are presumed incapable of consent (though the age of consent varies greatly from state to state). Accordingly, information about these practices remains a likely candidate for prosecution under COPA because it may not be deemed of value to minors.[16] Again, adults will be

15. *See, e.g.*, QuickCondoms.com, *"How to Give Oral Sex to a Man – Beginner," http://www.quikcondoms.com/content.jsp?ch=sexpert&id=85*; Go Ask Alice!, "Oral Sex with a Condom – Does It Feel Good to the Recipient?," *http://www.goaskalice.columbia.edu/1614.html*; T. Cox, "Oral Sex: Tips for Her and Him," *http://www.ivillage.com/relationships/experts/experts_by_month/articles/0,9632,166929_92901,00.html*; S. Gardos, "Dear Dr. Gardos," *http://thriveonline.oxygen.com/sex/experts/drgardos/drgardos.04-09-01.html*.

16. Perhaps, in light of the medical findings, there will be an exception for disease-prevention information.

proscribed from readily obtaining information to which they are entitled under the First Amendment.

Homosexual activities. This Court is no stranger to the emotionally-charged issues relating to gay rights. In his dissent in *Romer v. Evans*, 517 U.S. 620, 644-48, 652 (1996), Justice Scalia described a "culture war" between "those who wish to retain social disapprobation of homosexuality" and those who do not. The Court in that case struck down as discriminatory a state constitutional provision prohibiting laws designed to protect gays and lesbians. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that the Boy Scouts were not required to admit a homosexual member because they believe that homosexuality is inconsistent with their values. Justice Stevens' dissent in *Dale* recounted "remarkable changes in attitudes about homosexuals" that have occurred in recent years. *Id.* at 699-700.

The World Wide Web contains a large amount of information about homosexual practices, including, for example, The Body, *http://www.thebody.com*, an AIDS and HIV information site to which the AIDS Project of *amicus* Lambda Legal Defense and Education Fund is a frequent contributor.[17] To the extent that this information is not already in danger under COPA because it deals with non-traditional sexual conduct such as sodomy, the fact that it relates to same-gender relationships is bound to cause it to be labeled by many as unsuitable for minors. Those desiring to retain what Justice Scalia called "moral and social disapprobation of homosexuality" (*Romer*, at 645) surely might disapprove of imparting information to minors

17. Articles from The Body are cited earlier in this brief. Other examples include: Mogenic, *http://www.mogenic.com/* (site providing columns, advice, forum for gay and lesbian individuals); Stop AIDS Project, "Oral Sex – Is It Safe?," *http://www.gay.com/* (site devoted to "connecting the lesbian, gay, bisexual and transgender communities").

about gay sexual practices. If such information is shielded under COPA, adults will be prevented from obtaining this important material.

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The First Amendment does not protect only information that the majority of Americans like or approve. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring). Few subjects are as likely to cause discomfort as frank discussions of sex, and particularly discussions of sexual topics that are outside of the mainstream. And few subjects are as likely to raise concerns as such discussions in the presence of minors. Most Americans agree that it is appropriate to protect minors from material that is unsuitable for them. But COPA's restrictions on sexual speech to protect minors are likely to prevent *adults* from engaging in a large amount of Internet discourse about sexual health that is legitimate and valuable. For that reason, COPA is unconstitutionally overbroad.

C. COPA Is Overbroad Because It Restricts Artistic and Intellectual Expression.

The overbreadth of COPA threatens more than the dissemination of *information*, as in the examples just discussed. Its chilling effect is acutely felt among those who wish to use the Web for artistic or intellectual *expression*. The "harmful-to-minors" test that COPA sets forth cannot offset this chill, for it utilizes an inquiry that is fundamentally subjective, and therefore flawed in its attempt to distinguish content that may be appropriate for minors from that which may be appropriate for adults. This is especially evident when evaluating whether any given example of expression possesses serious literary or artistic value for minors as opposed to adults.

Perhaps the best illustration of COPA's unconstitutional overbreadth is the posting of visual art on the

Internet. Museum web sites provide information about their exhibits and also display actual works of art online. These museums, like many other content providers, have no cost-effective, reliable means of distinguishing adults from minors among their audience, and thus are reduced under COPA to censoring all of their posted artwork accordingly to a standard that permits only works deemed of serious value to minors, without regard to whether works failing that amorphous test still have serious value for adults. As the degree of subjectivity applicable to such evaluations of "serious value" increases, this overbreadth problem is magnified.

Online exhibits of the nude photography of Robert Mapplethorpe exemplify this point. Mapplethorpe's works have received both acclaim and extreme approbation, and were a topic of discussion by both the district court and this Court in *Reno*. The district court in *Reno* observed that the government had *conceded* that Mapplethorpe's photographs "would be patently offensive in some counties." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996). This Court, in a part of its opinion adopting findings of the district court, specifically referred to works of Mapplethorpe exhibited on the web site of *amicus* California Museum of Photography at The University of California, Riverside (UCR) –

> "when the UCR/California Museum of Photography posts to its Website nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore and New York City, but also in Cincinnati, Mobile, and Beijing – wherever Internet users live."

521 U.S. at 854.[18] This observation is equally pertinent to COPA, which includes within its scope all content "available to any minor." Thus, despite all the efforts Congress devoted to making COPA narrower than the CDA, this artistic content, threatened before, remains threatened.

The fact of the matter is that works of art often are provocative, which to many means that they are offensive and without value. *See generally National Endowment for the Arts v. Finley*, 524 U.S. 569, 574-75 (1998) (discussing works of Mapplethorpe and Andres Serrano). Disputes about the merit of artistic expression occur frequently in our country, such as when the Museum of International Folk Art, a

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18. A picture of a UCR web page comparing the works of Weston and Mapplethorpe (which is still on the Web today, *http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*) was featured in briefs submitted to the district court and this Court in *Reno* by *amici* that included UCR:

Source: http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html

A comparison of *Weston's Nude Floating*, 1939 and Mapplethorpe's *Thomas*, 1986, provides one example of the shift in context presented by this exhibition.

Weston's *Nude Floating*, 1939, an image of a women floating face up in a swimming pool, with Mapplethorpe's *Thomas*, 1986, an image of a nude man tautly posed in a square structure. Here, the modern, formal analysis usually applied to Weston's work expands to embrace postmodern themes rooted in societal relationships, gender, race, and sexuality. Likewise, Mapplethorpe's work examined next to Weston's invites the viewer to look beyond the lingering NEA controversy and see the image for its formal complexities in the tradition of modernist photography. In both cases the comparisons serve to more firmly ground the artists' work in 20th century art practice.

CAPTIONS:
Edward Weston, *Nude Floating*, 1939. Special Collections, UC/Santa Cruz.
Robert Mapplethorpe, *Thomas*, 1986, Robert Mapplethorpe Foundation, © 1986. Estate of Robert Mapplethorpe. Used by permission.

Other examples of Mapplethorpe's work that are posted on UCR's web site include: *Lisa Marie, http://www.photography.net/assets/duplicate1/maple003_Hnew.jpg; Lydia Cheng, http://www.photography.net/assets/duplicate1/maple004_Hnew.jpg;* and *Sonia Resika, http://photography.net/assets/duplicate1/maple005_Hnew.jpg. See also,* R. Mapplethorpe, *Man in a Polyester Suit, http://witcombe.sbc.edu/masculinity/malefallacies7.html.*

branch of Santa Fe's Museum of New Mexico, displayed an artistic depiction of Our Lady of Guadalupe, the popular Hispanic image of the Virgin Mary. *See Santa Fe Madonna Sparks Firestorm*, Art in America, Jun. 1, 2001, No. 6, Vol. 89, p. 23. The image, by California artist Alma Lopez, was a computerized photo collage of the Virgin wearing a bikini of roses and held aloft by a buxom, bare-breasted angel. It is now posted by her on the Web (*Our Lady, http://www.almalopez.net/*). While Lopez based the image on her feminist Hispanic background and considered it reverential, Santa Fe residents responded with threats of censorship and the show's curator was accused of promoting "cyber porn." *Id.*

Controversies such as these prove that the subjectivity of artistic expression makes it fertile ground for a statute that requires courts to distinguish as a matter of law between content of value to minors and content of value to adults. There is much art already on the Web, including but not limited to photographic art, available on museum web sites and potentially within COPA's "harmful to minors" definition.[19] COPA's overbreadth endangers the availability of these works to adults and may ensure that additional works of artistic value to adults will never become available on the Web in the future.

Private art galleries face the same problem. Indeed, because art galleries tend to exhibit newer original works not yet vetted by the art world and accepted as at the level of inclusion in museum collections, the problem may be

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19. *See, e.g.*, Metropolitan Museum of Art, *Study of a Nude Man, http://www.metmuseum.org/collections/view1.asp?dep=11&item=52%2E71*; Getty Museum Collections, Paul Outerbridge, *Woman with Meat Packer's Gloves, http://www.getty.edu/art/collections/objects/o62648.html*; UCR, California Museum of Photography, "Continuous Replay: The Photographs of Arnie Zane," *http://www.cmp.ucr.edu/photography/zane/default.html*; *id.*, "The Torsos," *http://www.cmp.ucr.edu/photography/zane/torsos.html*.

heightened. *Amicus* Chuck More, for example, posts on the Web site for his Philadelphia art gallery a variety of nudes that might reasonably be construed as satisfying COPA's definitions of what is "harmful to minors," yet have serious artistic value for adults.[20] Art galleries abound on the Web, and examples of content that is of serious value to adult collectors yet might be deemed to fall within the definition of "harmful to minors" are not difficult to find.[21]

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20. *See, e.g.*, More Gallery, Nelson Shanks, *Squeaky's Beads*, *http://www.moregallery.com/GifWrap1.asp?RecordNumber=549*.

21. *See, e.g.*, the nudes of Edward Weston (*Nude, New Mexico, 1937, http://www.edward-weston.com/portfolios/images/nudes1/nude_new_mexico.html; Nude, 1936, http://www.edward-weston.com/portfolios/images/nudes1/nude_219n.html; Nude, 1927, http://www.edward-weston.com/portfolios/images/nudes1/nude_7n.html*); the nudes of Tomasz Rut ("Couples Gallery Page," *http://www.tomaszrut.com/pages/art/rut/couples.htm; Il Momemto, http://www.tomaszrut.com/pages/art/rut/il_momento.htm; Adamo, http://www.tomaszrut.com/pages/art/rut/adamo.htm*; and *Impromptu II, http://www.tomaszrut.com/pages/art/rut/impromptu2.htm*); New York Art World, Joseph Catuciio, *Untitled Mural 8, http://www.newyorkartworld.com/gallery/catuccio.html;* Motley Focus Locus, "Images" gallery, *http://www.motley-focus.com/~timber/images.html* (gallery "look[s] for overtones of heart, mind and sensuality in all the art [it] select[s]" with "no preconceived restrictions"); *id., Power 1, http://www.motley-focus.com/~timber/power1.html;* the photography of David Glove ("Fine Art Photography Nudes for Men and Women," *http://www.redshift.com/~daveslite/*; "Narcissus in Hell," *http://www.redshift.com/~daveslite/Narchome.htm; Lighten Up, http://www.redshift.com/~daveslite/lighten_up.htm; Host, http://www.redshift.com/~daveslite/host.htm*; "Studio Exotica," *http://www.redshift.com/~daveslite/studiomenu.htm*); and the untitled works of Pennsylvania artist Scott Church ("Welcome to My Daydream," *http://www.angelfire.com/pa/scottchurch/*; The Art of Scott Church, *http://users2.nbn.net/~schurch/images/torso1.jpg; id., http://users2.nbn.net/~schurch/images/hnc.jpg*).

The First Amendment does not tolerate banning non-obscene art works from adult viewers merely because such works could be deemed harmful to minors. *See American Booksellers*, 484 U.S. at 389. But COPA subjects art exhibited on the World Wide Web to precisely that damage. In this sense, COPA is just as overbroad, and just as chilling to freedom of expression, as was the CDA, and all Congress' efforts to narrow the statute's reach are for naught.

The *American Booksellers* decision also illustrates the potential harm posed by COPA to *amici* like the Authors Guild and the American Society of Journalists and Authors. Many of the controversial literary works at issue in that case are on the Web.[22] These *amici* represent thousands of writers, any number of whom may want or need at some point to place their writings – essays, articles, poetry, short stories, and more – on the Web. If federal courts could be uncertain and divided as to whether James Joyce's *Ulysses* – a novel of recognized literary value to adults – is "harmful to minors," as in *American Booksellers*, then certainly it is reasonable for other authors (and especially those not yet as widely received and studied as is Joyce) to feel uncertain about whether their own literary works might be viewed by some prosecutor or court as lacking in literary or artistic value to minors and therefore deemed in violation of this criminal statute. The only safe response to

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22. In some cases, they are newer editions, or at least excerpts from the works. Examples include: R. Bell, *Changing Bodies, Changing Lives* (3d ed. 1998), *http://www.ourbodiesourselves.org/cbcl.htm* (excerpts); J. Collins, *Hollywood Wives: The New Generation* (2001), *http://www.chron.com/cgi-bin/auth/story/content/chronicle/ae/books/01/07/01/collinsch1.html* (excerpts); S. Donaldson, *Lord Foul's Bane* (1977), *http://netserver.massmedia.com/~mikeb/booktour/lord_fouls_bane.htm*; J. Joyce, Ulysses (1961), *http://www.bibliomania.com/0/0/29/61/frameset.html, http://www.robotwisdom.com/jaj/ulysses/index.html; Our Bodies Ourselves for the New Century* (1998), *http://www.ourbodiesourselves.org/excerpts.htm* (excerpts).

such reasonable concern is self-censorship, and the result is that the Web would then never see an inestimable amount of literary creations. This affects not only the authors, but also adult Web users, who would be the poorer for the inevitable limitation of literary works available in this medium. Thus is COPA's overbreadth exposed.

The multi-media nature of the Web, synthesizing as it does not only textual but also audio and visual expression, means that even artistic expression not readily reducible to print form is fully available to both adults and minors. This is true, for example, of music. Lyrics of popular and even critically acclaimed songs are available on the Internet both in text form and audio streams.[23] Once it is posted on the Web on commercial music sites, this music is available to adults and minors without distinction. Whether courts ultimately will determine that such expression lacks "serious . . . artistic . . . value for minors" cannot be answered neatly and with certainty by content providers, again illustrating that COPA unconstitutionally reduces content on the Web to only that deemed fit for children.

D. COPA Is Overbroad Because It Restricts Access to Materials of Educational Value to Adults.

The widespread use of the World Wide Web by educational institutions presents another example of the tension between online expression and the resulting overbreadth of COPA. The statute fails to acknowledge, let alone constitutionally reconcile, this tension, since "educational" value is not even listed in Section 231(e)(6)(C).

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23. *See, e.g.*, Public Enemy, *http://www.publicenemy.com/lyrics/* (lyrics to songs by hit music group); Limp Bizkit Fan Site, *http://www.geocities.com/ResearchTriangle/Node/7156/sites/limpbizkit.html* (fan site with lyrics); Eminem, *http://www.eminem.com/* (providing recent Grammy-award winning music of artist Eminem).

Recognizing the power of the Internet to transmit ideas, educational institutions have established a significant presence on the Web. Education and intellectual pursuit through those web sites perhaps best evidences the dual aspect of COPA's overbreadth that is at play here: the statute restricts not only content providers but also content seekers. As content providers, professors post course materials, and college and graduate students post academic work product, on the Web. But where the Web truly shines is in its ability to make a mind-boggling array of information and expression readily available to students — including adults — in a wide variety of academic disciplines. Students of anything from abnormal psychology to sociology, gender studies to literature, may plumb the Web for knowledge, ideas and understanding of their studies and of the wider world around them. As an essential part of the human experience, sexuality will inevitably be part of that process, sometimes in ways that some may believe appeal to prurient interests and lack serious value, at least for minors. And, as demonstrated above, much of this content may be found on web sites that fit within COPA's broad definition of "commercial." It is axiomatic that, in narrowing content available on the Web to that which is not "harmful to minors," much that is valuable for adults will be lost. This result of COPA's overbreadth is the antithesis of the limitless marketplace of ideas that the Web has come to exemplify.

An example of how educators use the Web to this dual purpose is provided by *amicus* Peter Ludlow, an Associate Professor in the Department of Philosophy at the State University of New York at Stony Brook, who places online the course materials for his "Conceptual Issues in Cyberspace" and "Moral Reasoning" classes. *See, e.g.*, P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://semlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html*. The courses cover such issues as the nature of online sexual behavior in multi-user online games and application of moral reasoning concepts to ethical dilem-

mas that arise in cyberspace. They include discussions of censorship on the Web – with sites threatened under COPA among the course materials. These items, intended for use by young adults in the university setting and of serious value to them academically, would be equally available to minors on the Internet.

The same is true of a course entitled "Sex and Gender in Pre-Modern Europe," offered in the History Department of the University of North Florida. The class web site for the 'Sex and Gender" history course states that the class syllabus, outline, and other handouts also have been made available on the Web precisely because "[t]he Internet is now a valuable research tool for students."[24] Moreover, required class readings include "primary documents available on the World Wide Web," and the site includes hyperlinks to those documents in full text. These links are to readings that discuss sexuality, including a comparison of the merits of sexual relations with women versus that with young boys in an ancient Greek text; discussions of homesexuality by ancient Romans; classical descriptions of lesbianism; and an account of the gay subculture in early eighteenth-century London.[25] Whether texts such as these fall within COPA is not a clear-cut question, but under COPA's "harmful to minors" definition the potential is real, and the resulting reasonable uncertainty would be

24. *See* Sex and Gender in Pre-Modern Europe, *http://www.unf.edu/classes/sexgender/* (class web site).

25. *See id.* (fn. 24, *supra*), linking to: Anchilles Tatius, *Leucippe and Clitophon*, "Women unfavorably compared with boy lovers," *http://www.uky.edu/ArtsSciences/Classics/wlgr/wlgr-privatelife241.html*; Seneca, "Natural Questions" (excerpt), *http://www.fordham.edu/halsall/pwh/seneca-nq1-16.html*; Lucian, *Dialogues of the Courtesans*, "Leaena and Clonarium," *http://www.fordham.edu/halsall/pwh/lucian-court.html*; Rictor Norton, *Gay History & Literature*, "The Gay Subculture in Early Eighteenth-Century London," *http://www.infopt.demon.co.uk/molly2.htm*.

sufficient to chill this Web-based speech that has serious academic value for adults.[26] That is the essence of *amici*'s argument for why COPA is, ultimately, unconstitutionally overbroad.

26. Another example is presented in an essay posted by a Sweet Briar College art history professor on the school's web site. *See* Christopher Witcombe, "Male Fallacies: Images of Men and Masculinity in Art," *http://witcombe.sbc.edu/masculinity/index.html*. The site includes several images that might simultaneously be deemed "harmful to minors" and yet have literary, artistic, and even political value for adults. Analytical text that accompanies each image conveys the academic purpose of the professor's use of the image as well as the artistic and political messages intended by their creators. *See, e.g., id.*, "Phallic Power," *http://witcombe.sbc.edu/masculinity/malefallacies7.html*.

CONCLUSION

COPA's breadth exceeds that which is necessary to accomplish any legitimate objective of Congress. It therefore violates rights of free expression under the First Amendment. For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the three-judge panel that preliminarily enjoined enforcement of the Child Online Protection Act, and to hold that COPA is unconstitutional.

Respectfully submitted,

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Dated: September 20, 2001.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Society of Journalists and Authors** is a national organization of leading independent writers of non-fiction. Many of the members write on sexuality, science, medical, and marital issues. Some write directly for the World Wide Web; others write for the print media. In both cases, the works often are placed on the web. The Society and its members are concerned that COPA will prohibit its members' writings from being placed on the Web and will chill free expression online.

The **Authors Guild** is a national association of almost 8,000 professional book and periodical writers of all genres, including journalists, historians, biographers, and other writers of fiction and nonfiction. Founded in 1912, it is the oldest and largest organization of published writers in the United States. Members of the Authors Guild include winners of the Pulitzer and Nobel Prizes, National Book Awards, and other prestigious awards and prizes. The Authors Guild works to promote the professional interests of its members and to educate the community at large on issues facing publishing-related industries.

One of the Authors Guild's principal purposes is to express its members' views in cases involving questions of freedom of expression and to support that fundamental constitutional right. Many of its members rely heavily on the extraordinary opportunity for free and open communication offered by the World Wide Web, which allows its members to participate in a true "marketplace of ideas." The Authors Guild opposes COPA because it will chill free speech in this important forum.

Bay Area Lawyers for Individual Freedom ("BALIF") is a minority bar association of over 500 lesbian, gay, bisexual, and transgender members of the San Francisco Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian, bisexual, and transgender community at large. As part of that mission,

BALIF actively participates in public policy debates concerning the rights of lesbians, gay men, bisexuals, and transgender persons. BALIF frequently appears as an *amicus curiae* in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance, such as this case. BALIF believes that while some of the purposes underlying COPA may be laudable, the statute is unconstitutionally broad in that it infringes upon important, legitimate speech of particular interest to the gay, lesbian, bisexual, and transgender community.

Since 1993, the **California Museum of Photography at the University of California, Riverside** ("UCR/CMP") has been producing exhibitions on the Internet that combine both fine art and scholarship. The Museum promotes understanding of photography and related media through collection, research, exhibition, and instruction, and is vitally concerned with the intersection of photography, new imaging media, and society. The Museum provides a supportive and challenging environment that stimulates discourse about issues relevant to the lives and interests of artists, scholars, and the general public. *See generally* UCR/CMP Information, *http://www.cmp.ucr.edu/photo/info.html#sheet/*. UCR/CMP hosts a Museum Store on its website and has joined the world's largest online bookstore, Amazon.com, to offer the most comprehensive collection of fine art books, CD's, and videos, through a link from that online Museum Store. Part of every purchase made through the Amazon.com link in the Museum Store is used to benefit the Museum. *See* UCR/CMP Museum Store, *http://www.cmp.ucr.edu/books/*.

The Museum is concerned that such online exhibits as a comparison of the work of photographers Edward Weston and Robert Mapplethorpe (*see http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*), Lucien Clergue's Nudes (*see http://www.cmp.ucr.edu/exhibitions/signs/*), and Robin Rosenweig's Three Bodies (*see http://www.cmp.ucr.edu/photography/bodies/*) may be restricted by COPA. The Museum has long championed use of the Internet as an expressive medium for both individual artists and for collaborative activities. Provisions in the COPA could prohibit both advanced scholarship in the visual arts and practice by contemporary artists exploring the unique attributes of the Internet as a medium for pictorial discourse and active collaboration across state and international boundaries.

Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through litigation, education and public policy work. Lambda was founded in 1973 and brought the first AIDS discrimination lawsuit in 1983. Much of Lambda's litigation and advocacy work focuses on ensuring that lesbians and gay men can communicate openly about their sexual orientation without retribution, and on ensuring that all people — including young people — have access to accurate, understandable HIV prevention and treatment information.

Lambda uses the Internet to communicate with its clients and constituents, and to disseminate information about legal and policy issues related to sexual orientation or AIDS to lawyers and grassroots activists throughout the United States and abroad. Lambda's AIDS Project frequently contributes to a Web site — The Body, *http://www.thebody.com* — that is dedicated to providing a wide range of medical, social, political, and legal information of importance to people with HIV. Lambda also has designed its own Web site, through which it attempts to reach gay youth with information about their rights and about resources that may help them deal with the isolation that so many gay and lesbian adolescents feel in homophobic family, school, or community environments. Lambda GLBT Community Services, *http://www.lambda.org/*. Lambda also uses the Internet to distribute press releases.

Expression about topics related to sexuality, or about sex itself, has inherent value and should remain free from government interference on the Internet. COPA jeopardizes Lambda's own postings on Web sites and ongoing use of the Internet to communicate with individuals across the country and internationally about gay- or HIV-related issues.

Dr. Peter Ludlow is an Associate Professor in the Department of Philosophy at the State University of New York at Stony Brook. Included among the classes he teaches is a course entitled "Conceptual Issues in Cyberspace," which covers, in the online context, such philosophical issues as the nature of self and community. His practice is to place all of his course materials for the class on his home page, but COPA would place a chill on this teaching practice, and would compel him to remove some of the more controversial materials from his web site. See P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://semlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html*. He believes that under COPA he may be prohibited from placing on that site materials relating to the nature of online sexual behavior in MUDs (multi-user interactive games played over the Internet) and other materials that are essential to the course but that may be termed "harmful to minors." The teaching materials used for his course and located on his home page were published in his books *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (MIT Press 1996) and *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press 2001).

Professor Ludlow has also offered a course entitled "Moral Reasoning," which applied traditional concepts in moral reasoning to the ethical dilemmas that arise in cyberspace. Included on the class syllabus were discussions of censorship on the Internet and COPA itself. Professor Ludlow believes he cannot comprehensively or meaningfully teach these issues without giving examples of com-

munications that might be "harmful to minors" under COPA but which nevertheless are worthwhile communications, and that he cannot do so without violating COPA himself. Professor Ludlow was able to make available on the class web site most of the materials for the course, but would feel unable to provide online copies of the more controversial materials, and would be forced to either allude to their contents, or locate published hard copy versions of those materials where they exist, if COPA went into effect.

In addition to work that he does in academia, Professor Ludlow consults for information technology executives on issues relating to activities in the "internet underground." *See, e.g.*, CHAOS University 2001, *http://www.pm2go.com/chaos_university/agenda_p1.asp*. Here too, it is useful for Professor Ludlow to make available materials to potential clients – materials that may well be considered "harmful to minors" under the overly broad definition in COPA.

Professor Ludlow also uses his web site as a location to familiarize individuals with his books, and he provides links to the publishers of those books. In this respect, given the overly broad notion of commercial web sites, Professor Ludlow is concerned that his site may be considered commercial – all the more so in view of his consulting activity. He views COPA as directly targeting both his ability to teach and to consult effectively.

Chuck More owns an art gallery in Philadelphia, Pennsylvania. He authors a Web site to display exhibitions of artwork sold at his gallery. *See* The More Gallery, *http://www.moregallery.com/*. The art displayed on his site regularly includes nudes, both painted and photographed. *See id.* Such artwork, displaying as it does sexual organs, could be considered "harmful to minors" according to the standards of some communities, thus placing Mr. More in jeopardy of criminal prosecution.

Don Rittner is the publisher of **The MESH — Inside Cyberspace**, a Web version of a monthly magazine covering the Internet. *See* The MESH — Inside Cyberspace, *http://www.themesh.com:80/meshinfo.html*. Mr. Rittner believes that COPA, if put into effect, will limit his choice of content for his magazine, thus infringing on his First Amendment right to free expression. He further believes that it is unclear under the terms of COPA precisely what speech he must remove or exclude to avoid prosecution and that, in order to reconcile this lack of clarity, he will be required to take an overbroad view of materials that might be deemed "harmful to minors."

Safer Sex Institute ("SSI") is an unincorporated association for which Safersex.org is the service mark. Safersex.org is the oldest safer sex educational site on the Internet. The site has been repeatedly named as one of the "best of the net" Web sites and is mentioned in numerous CD-ROMs, college textbooks, and other popular books concerning sexuality and health on the Internet. Over 80,000 people per month examine the Web site. The information on the site includes definitions of sexual organs, sexually transmitted diseases, and other issues related to sexuality that could be considered "harmful to minors" according to particular community standards. *See* SaferSex.org, *www.safersex.org*.

The **Sexuality Information and Education Council of the United States (SIECUS)** is a national nonprofit organization incorporated in 1964 that develops, collects, disseminates, and promotes comprehensive information about sexuality, and advocates the rights of individuals to make responsible sexual choices. *See* SIECUS, *http://www.siecus.org/*. It believes that sexually explicit speech and visual materials are indispensable elements of sexuality education, and that COPA may restrict the appropriate professional use of such materials by sexuality educators, therapists, and researchers. *See id.*

Supreme Court, U.S.
FILED
SEP 20 2001
CLERK

No. 00-1293

IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* VOLUNTEER LAWYERS FOR THE ARTS AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals for the Third Circuit committed clear error in concluding that the district court did not abuse its discretion by granting a preliminary injunction that bars enforcement, pending discovery and trial, of the Child Online Protection Act (COPA), 47 U.S.C. § 231 *et seq.*

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Volunteer Lawyers for the Arts ("VLA") is a not-for-profit organization that provides legal assistance to artists and non-profit artistic organizations. VLA and its clients believe that the First Amendment protections enjoyed by visual expression is as vital to the nation's ability to communicate on important issues as is verbal expression. VLA also believes that a reversal of the preliminary injunction entered below would chill its clients' ability to express themselves, to innovate, to exhibit their work, and to distribute their work on the Internet in a manner sufficient to provide a livelihood.

Amicus Curiae People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 500,000 members and supporters nationwide. People For has represented parties and filed *amicus curiae* briefs in important cases before the Supreme Court and lower federal courts defending First Amendment freedoms, including, in particular, cases concerning the regulating Internet content for minors such as *American Library Ass'n v. United States Dep't of Justice* (in which this Court struck down the prior federal "Communications Decency Act"). In addition, for many years People For researched and published national reports on attempts to ban

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[1] Written consent to the filing of this brief has been obtained from the parties and is lodged herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

or restrict books and other materials in public schools which demonstrated tremendous differences between and within states as to the appropriateness of such materials for minors. People For believes that, because of the general inability to determine age or geography with respect to Internet communications, COPA would impose a national, lowest common denominator standard that would restrict and chill the communication and receipt of valuable expression relating to health, sex education, culture, and other matters throughout the United States by adults as well as minors in violation of fundamental First Amendment freedoms.

Amici therefore have a strong interest in providing the Court with information relevant to, and with analysis of, the crucial issue whether the preliminary injunction below was erroneously entered.

SUMMARY OF ARGUMENT

1. The narrow question before this Court is whether the Court of Appeals erred in its conclusion that the district court did not commit clear error in granting the injunction below. Far from committing clear error, the district court's decision is a prudent step preserving the *status quo ante* pending development of a full factual record. On the present record, the district court properly concluded that COPA's reliance on a mythical consensus community standard on the types of material that should be considered as harmful to minors renders COPA fatally overbroad. By incorporating a supposed national consensus view on what is harmful to minors, COPA threatens to "strangle[]" the existing diversity of views on which material is permissible "by the absolutism of imposed uniformity." *Miller v. California*, 413 U.S. 15, 33 (1973). In addition, if COPA is construed to refer to a national "adult" standard concerning material that should be restricted, this Court will necessarily be forced to act as the

final arbiter of the precise contours of that hypothetical national standard. This Court wisely rejected that role in *Miller* with respect to material that should be considered obscene, and should also reject that role with respect to discerning whether material is harmful to minors.

2. On the present state of the record, it appears that an Internet speaker cannot restrict access based on the geographic locations of the listener. But even if such geographic filtering were available, COPA could not pass Constitutional muster because COPA cannot be found to be the least restrictive method of protecting minors from potentially harmful content on the Internet. Using existing technology, parents can and should exercise discretion and control over their children's Internet use in a manner that does not restrict the material available to other children, other parents, or to adults in general.

FACTS

Our nation is composed of diverse communities that do not share a consensus view on the types of artistic or other materials that may be harmful to minors. For each area of artistic endeavor, a range of opinions can be found that undermine any notion of consensus on either the "prurient" or "offensive" nature of the expression itself, or whether, even if prurient or offensive, it might nevertheless have serious artistic value for minors. Indeed, adult opinion on what types of material (artistic and otherwise) may be harmful to minors is literally all over the map.

A. Community Standards Differ Widely In The Context Of Literature.

Between 1985 and 1996, People For the American Way[2] produced annual reports of its extensive investigation and research documenting hundreds of attempts to remove books or other materials from public school curriculum and libraries all across the country as inappropriate for minors. (*See, e.g.*, People For the American Way, *Attacks on the Freedom to Learn: 1995-96 Report* (1996) ("1996 Freedom to Learn Report")).[3] The reports did not include attempts by parents to prevent their children from reading any particular material, but rather attempts by individuals to ban or restrict what *all* minors would be able to read. These reports consistently demonstrate not only that particular books and materials were challenged in some communities as inappropriate for minors and not in others, but also that challenges to the exact same book or other material were upheld by school boards or adult review committees in some communities and struck down by similar groups in other communities.

For example, during the 1994-95 school year, a school board in Wimberley, Texas voted unanimously to remove award winning author Maya Angelou's autobiographical novel *I Know Why The Caged Bird Sings* from a ninth-grade honors English class because of sexually explicit content and references to rape and masturbation. The school board acted in part based on a survey by the superintendent of ninth-

[2] This 501(c)(3) research and education-oriented organization is now called People For the American Way Foundation and is one of the *amicus* organizations represented in this brief.

[3] These extensively documented reports provide evidence of a consistent pattern for over a ten-year period of sharply differing community standards as to what books and materials are deemed appropriate by adults for minors under 17 years of age.

grade parents that indicated a majority favored removing this best-selling book. (*See* 1996 Freedom to Learn Report at 207). Conversely, in October, 1995, a public school review committee in Shawnee Mission, Kansas unanimously agreed that the very same book was "appropriate for student in-class instruction in grades eight through twelve," although a parent had objected that the book was "absolutely inappropriate for secondary level students" stating that it contained "pornographic and violent material . . . ." (*See* 1996 Freedom to Learn Report at 144).

Similarly, Judy Blume's books *Are You There God? It's Me, Margaret* and *Forever*, which contain frank discussions of adolescent sexuality and are explicitly aimed at a teenage audience, are featured on the American Library Association's list of The 100 Most Frequently Challenged Books of 1990-1999 (the "ALA List"). (*See* http://www.ala.org/alaorg/oif/top100.pdf). Nevertheless, *Are You There God? It's Me, Margaret* was also included on the New York Times list of Outstanding Books of the Year in 1970, the year it was first published, and in 1996, Ms. Blume received the Margaret A. Edwards Award for Lifetime Achievement from the American Library Association. Toni Morrison, winner of the Nobel Prize for Literature, authored three books have been frequently challenged and in some cases restricted in various locations, at least in part for their sexual content. Yet all three of Ms. Morrison's banned books are *also* included in the California Department of Education's database of "Recommended Literature: Kindergarten Through Grade Twelve" (the "CDE Database").[4] (*See* http://www.cde.ca.gov/literaturelist/litsearch.asp). In fact, a total of 37 books have the ironic distinction of being featured on *both* the CDE

[4] *Beloved*, *Bluest Eye*, and *Song of Solomon*, all by Toni Morrison, are listed on both the ALA List and the CDE Database.

"recommended reading" database and the ALA "banned book" list.[5]

Aldous Huxley's *Brave New World* was removed from a high school library in Foley, Alabama after a parent complained about the book's references to orgies, self-flagellation and the book's contempt for religion, marriage and the family. *Brave New World* ranks fifth on the Modern Library "List of the Best English Language Novels of the Twentieth Century," as published by Random House (*see* http://www.randomhouse.com/modernlibrary/100best/novels.html), and also ranks 54th on the ALA List. J.D. Salinger's *Catcher in the Rye* is the tenth most banned book of the 1990s according to the ALA List, in part because of objections to the use of profanity in the book and its description of sexual situations. Yet *Catcher in the Rye* remains required reading for incoming juniors at Farmington High School in Farmington, Connecticut. (*See* http://www.farmington.lib.ct.us/fhs2001.htm).

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[5] The following books are featured on both the ALA List and CDE Database: M. Angelou, *I Know Why the Caged Bird Sings*; M. Twain, *The Adventures of Huckleberry Finn*; J. Steinbeck, *Of Mice and Men*; K. Paterson, *Bridge to Terabithia*; J.D. Salinger, *Catcher in the Rye*; L. Lowry, *The Giver*; C. Collier and J.L. Collier, *My Brother Sam is Dead*; B. Greene, *Summer of My German Soldier*; P.R. Naylor, *Achingly Alice*; A. Walker, *The Color Purple*; K. Paterson, *The Great Gilly Hopkins*; M. L'Engle, *A Wrinkle in Time*; L. Lowry, *Anastasia Krupnik*; J.C. George, *Julie of the Wolves*; M. Mathabane, *Kaffir Boy*; T. Morrison, *The Bluest Eye*; T. Morrison, *Beloved*; W.D. Myers, *Fallen Angels*; M. Atwood, *The Handmaid's Tale*; S.E. Hinton, *The Outsiders*; H. Lee, *To Kill a Mockingbird*; R. Cormier, *We All Fall Down*; D. Keyes, *Flowers for Algernon*; J.K. Rowling, *Harry Potter and the Sorcerer's Stone*, R. Dahl, *James and the Giant Peach*, S. Silverstein, *A Light in the Attic*, A. Huxley, *Brave New World*; J.L. Conly, *Crazy Lady*; L. Rodriguez, *Always Running*; K. Vonnegut, *Slaughterhouse Five*; W. Golding, *Lord of the Flies*; R. Wright, *Native Son*; M.D. Bauer, *On My Honor*; I. Allende, *House of the Spirits*; R.A. Anaya, *Bless Me, Ultima*; T. Morrison, *Song of Solomon*; S. King, *Christine*.

B. Community Standards Differ Widely In The Context Of Music.

A 1998 free high school concert tour by a popular folk-rock duo, the Indigo Girls, provides a good example. The Indigo Girls, who have performed together for over ten years, have sold more than seven million albums worldwide and have earned six "Grammy" nominations by the National Academy of Arts and Sciences, including winning the 1989 Grammy Award for Best Contemporary Folk Group. In 1998, the group had scheduled several free concerts at high schools across the southern United States to perform and share their knowledge about songwriting and the music industry. While they were welcomed without incident at many high schools during this tour, officials at two Tennessee high schools canceled the free concerts citing alleged profanity in one song. In Columbia, South Carolina, the principal at Irmo High School canceled the group's appearance after complaints by parents relating to the fact that the two singers are gay and pressure from the school board chair who claimed the group was promoting a homosexual agenda. (*See* People For the American Way Foundation, *Hostile Climate: Report on Anti-gay Activity* (1999), at 199-200, 202.)

C. Community Standards Differ Widely In The Context Of Film and Television.

Reactions to film and television fare no better. After the American Family Association ("AFA") launched a national campaign against the film *Showgirls* (1995) — a film released by Metro-Goldwyn-Mayer — claiming it was "pornographic," a theater company in Memphis, Tennessee removed the film from two of its theaters in another state. However, Circle 7, an independently owned and operated theater in Bennington, Vermont, screened the film notwithstanding the protests of the local chapter of the AFA.

The AFA launched a similar national campaign against *NYPD Blue*, a critically-acclaimed dramatic series aired on the American Broadcasting Corporation television network, also claiming that the series was pornographic. In response, 22 business owners in Jonesboro, Arkansas pulled their local advertisements scheduled to air during the program.

Similarly, school district officials in Coon Rapids, Minnesota prohibited students from watching in class *The Piano*, winner of the 1993 Academy of Motion Picture Arts & Sciences award for Best Picture, after a parent complained that the movie was inappropriate due to scenes of nudity and violence.

D. Community Standards Differ Widely In The Context Of Theater.

In the realm of live theater, members of the Christian Coalition in Clearwater, Florida circulated a petition condemning a theater for sponsoring Tony Kushner's *Angels in America*, the winner of seven Tony awards and the Pulitzer Prize, claiming that the play's "nudity, homosexual themes and sexual situations [were] inappropriate." Ruth Eckerd Hall, a non-profit arts organization, had announced its intended production in a brochure with a note stating that "*Angels in America* is serious adult theater with profanity, full nudity, gay themes and sexual situations. Not recommended for children." In December, 2000 in Jacksonville, Florida, the same play was physically torn out of dozens of textbooks at the Paxon School for Advanced Studies, after a student's parent complained about its descriptions of sex. The play was not used in any classes, but had been included in an anthology of plays distributed to students. (*See* Joe Humphrey, *School Excises Explicit Play From Textbooks*, The Florida Times-Union, Dec. 2, 2000, at A-1).

Similarly, in Mecklenburg, North Carolina, county commissioners voted to ban funding of art that shows "perverted forms of sexuality" or that "seek to undermine and deviate from the value and societal role of the traditional American family," in response to proposed productions of *Angels in America* and *Six Degrees of Separation*, by Tony Award-winner Tony Guare. The commissioners ultimately cut $2.5 million from the city's Arts and Science Council. (*See* People For the American Way Foundation, *Hostile Climate: Report on Anti-gay Activity* (1998), at 58).

E. Community Standards Differ Widely In The Context Of Fine Art.

In 1996, an assistant high school principal in New Castle, Delaware removed a student drawing entitled "Standing Nude Female" from an art exhibit in the school, claiming its depiction of nudity was inappropriate and potentially offensive The artist, Stephen Halko, drew the work during a ten-week figure-drawing course at the University of the Arts in Philadelphia. The drawing won a National Scholastic Award from the Delaware Department of Public Instruction, the Art Educators of Delaware, Inc., and Delaware State University, and was included in the exhibit on that basis.

A stage company administrator in Portland, Maine removed seven works that contained nudity from a lobby exhibit, claiming they were inappropriate and might offend visitors. The paintings, by artist Carlo Pittore, who had been invited to display his work in the lobby, depicted male and female nudes in various poses. The same paintings had been displayed in the past at other venues in the U.S. without controversy.

In sum, in a country as large and diverse as the United States, it is clear that no "reasonably constant" community standard exists among adults that governs questions of taste,

tolerance and artistic expression. American adults do not maintain any "reasonably constant" opinion of either the offensiveness or ultimate value of works that have achieved critical acclaim and wide popularity, let alone works at the fringes of artistic expression that are more explicitly intended to challenge, shock or criticize. As shown above, no consensus exists regarding a "narrow band" of sexual material that adults would agree is harmful to minors — instead, such material is the subject of wide-ranging and ongoing debate.

ARGUMENT

I. The Third Circuit's Decision Is Correct, Given The Present State Of The Record.

The government all but ignores the limited nature of appellate review of a trial court's decision to grant a preliminary injunction. It is nevertheless clear that the Third Circuit ruling must stand unless Petitioners can meet the high burden of showing that an "abuse of discretion" occurred in the "ultimate decision to grant ... the preliminary injunction". *Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999). Given the limited factual record below, and given the great deference wisely accorded to a district court's judgment regarding requests for preliminary injunctions, it is clear that no abuse of discretion occurred.

A. COPA's Attempt To Ignore Differing Community Standards To Define Proscribed Material Renders The Statute Fatally Overbroad.

In the first of COPA's three-element definition of material that is "harmful to minors," Congress explicitly calls upon *contemporary community standards* to define the type of protected expression that is subject to COPA's

restrictions. 47 U.S.C. § 231(e)(6) ("[T]he average person, applying *contemporary community standards*, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest." (emphasis added)). The phrase "contemporary community standards" is, of course, well known to this Court, which struggled for many years to find an acceptable definition of obscene material before finally settling on a definition which rests on the application of the varied local standards and mores that exist in the multitude of communities around the nation. *See Miller v. California*, 413 U.S. 15 (1973).

In *Miller*, this Court flatly rejected the notion that obscenity could be defined by referring to a hypothetical national standard, holding instead that a jury must evaluate accused material against the contemporary standards of the community in which the offending conduct took place. *Id.* at 33-34. *Miller*'s holding was premised on the unassailable fact that the fifty states do not share any single prevailing community standard concerning material that is considered obscene. *Id.* at 32. Indeed, the varying nature of community standards was crucial to the Court's decision that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32. The Court recognized the "danger to free expression" from "the use of 'national' standards" under which materials would be "unavailable where they are acceptable [in a community]." *Id.* at 32 n. 13. Since communities around the nation vary in their "tastes and attitudes" Congress could not "strangle[]" the existing diversity of views on which material is permissible "by the absolutism of imposed uniformity." *Id.* at 33.

As the Third Circuit recognized, communications via the Internet do not have a fixed, known geographic location. App. 24a; *See also American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997). Indeed, the beauty and power of the Internet lies in the ability of virtually any speaker to simultaneously address a global audience, and in the ability of a user to access communications from virtually any corner of the world. Thus, on the present state of the record, the Third Circuit's conclusion that no technology exists to geographically restrict Web site access is clearly correct. App. 29a.

Because present day technology does not permit an Internet speaker to exclude listeners from specific geographic locales, reliance on a community standard element to define proscribed content would necessarily lead to the most puritan view of what constitutes prohibited speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court recognized the absurdity (and, more importantly, the unconstitutionality) of such an approach, noting that to apply a community standard test in cyberspace would require every Internet communication to abide by the standards of "the community most likely to be offended by the message." *Id.* at 877-78. Thus, for example, a virtual art gallery would have to wonder if it faces prosecution based on display of paintings depicting any nudity simply because a single conservative American town might view any display of nudity to be "lewd."[6] The Barnes & Noble Web site — www.bn.com — offers readers the opportunity to read excerpts or entire chapters from select books and plays prior to purchasing them (such as Maya Angelou's *I Know Why the Caged Bird Sings* and Aldous Huxley's *Brave New*

[6] *See Wisconsin v. Stankus*, No. 95-2159-CR, 1997 Wisc. App. LEXIS 138 at *2-3 (Wisc. App. Feb. 13, 1997) (photograph of a woman with a shirt open to the waist, displaying portion of breast but not displaying nipple, falls within "harmful to minors" law).

World). As set out above, no consensus exists as to the prurient or offensive nature of these relatively mainstream works, and as a result, Web sites promoting their sale through this sort of sampling might reasonably fear prosecution under COPA because of offense taken by particular local communities.

The government contends that COPA's definition of material that is harmful to minors is nothing more than a faithful adoption of current First Amendment caselaw, and that the Internet is not entitled to any greater First Amendment solicitude than any other medium of communication. But the cases they cite to support this position are inapposite. For example, in *Hamling v. United States*, 418 U.S. 87, 105 (1974), this Court held that obscenity should not be judged based on a national standard but should instead rely on a juror's knowledge of the average person's views in his local community. Significantly, in *Hamling*, the defendants could have chosen not to mail unsolicited sexually explicit materials to some communities while continuing to mail them to others, effectively limiting their exposure to liability by avoiding those communities with particularly restrictive standards. Similarly, in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), the Court specifically recognized that the Sable telecommunications company was able to "tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve." This is precisely the type of geographic selectivity that is *not* available to an Internet speaker, as the decision below makes clear. App. 26a-27a.

Additionally, petitioner's argument, relying on *Hamling* and *Sable*, that it is acceptable to require a nationwide business to conform to community standards throughout the country as a cost of doing business is misplaced both factually and legally with respect to the Internet. First, the underlying premise that Internet speakers subject to COPA's

prohibitions intend or "choose" to conduct a nationwide business is simply wrong and is not supported by the current record. To the contrary, many small and local Internet operators who seek to make a profit communicate to a local clientele through their Web sites and, because of the nature of the Internet, simply cannot feasibly prevent their communications from reaching a national and international audience. This is true even where the operator sells nothing on-line, but merely provides information to local clients through the web and a forum for discussing products that are sold entirely at a local community store. Since a fully developed record would show that many Internet speakers do not conduct nationwide businesses (as was the case in *Sable* and *Hamling*), there is no basis for requiring local business owners to comply with widely divergent community standards throughout the country, particularly where they would have who have little or no knowledge of such standards. In addition, as discussed above, unlike sending mail to a zip code or a telephone message to an area code, it is not possible or feasible for the vast majority of Internet speakers to control where their speech can be received or to "tailor" their communications on a "selective basis." As a result, unlike the other federal statutes cited by the petitioner, COPA would impermissibly impose a national, lowest common denominator standard on a vast range of speakers, and on communication and content that would be deemed "acceptable" in many communities and was specifically protected under *Miller*.

B. COPA's Alleged Reliance On A Hypothetical National "Adult" Standard Is Equally Flawed.

1. Reliance on a national adult standard would require this Court to resume a role it rejected in *Miller*.

Congress recognized that application of "community standards" to the Internet was "controversial," and recommended that juries be instructed to refer to a hypothetical national "adult" standard rather than to any particular local geographic standard. H.R. Rep. No. 105-775 at 28 (1998). If COPA is construed to refer to a hypothetical, national "adult" standard, however, this Court will necessarily be placed in the position of being the final arbiter of the precise contours of that hypothetical national standard, a role it rejected in *Miller*.

In a line of decisions stretching from *Roth v. United States*, 354 U.S. 476 (1957), to *Miller v. California*, 413 U.S. 15 (1973), no definition of obscenity was able to capture a majority of this Court, and instead, the Court was forced to review obscenity cases on an *ad hoc* basis. Beginning with *Redrup v. New York*, 386 U.S. 767 (1967), the Court embarked on a policy of summary review and *per curiam* disposition of obscenity cases, disclosing nothing about its rationales or even about the nature of the materials reviewed. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 n. 8 (1973) (Brennan, J., dissenting). No fewer than thirty-one cases followed the *Redrup* approach[7], and, as a result, the

[7] Aside from the three cases reversed in *Redrup*, the 31 cases disposed in this fashion are: *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Aday v. New York*, 388 U.S. 447 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452

lower courts (and, perhaps more importantly, all those who desired to communicate on matters that might be considered obscene) were deprived of any guidance as to material that could be constitutionally restricted. *See Paris Adult Theatre I*, 413 U.S. at 82.

Chief Justice Warren (joined by Justice Clark) and Justice Black (joined by Justice Douglas) warned that the Court was stepping beyond its proper role as an appellate court. Chief Justice Warren expressly advocated a deferential standard of appellate review in obscenity cases as the only reasonable way of preventing the Court from sitting as "the Super Censor of all the obscenity purveyed throughout the Nation." *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Warren, C.J., dissenting).[8] In *Miller*, the Court eventually found that the "*Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us," 413 U.S. at 23 n.3, and expressly adopted a deferential standard based on local community views.[9] To

(1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. Louisiana*, 392 U.S. 655 (1968); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt v. Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 809 (1971); *Hartstein v. Missouri*, 404 U.S. 988 (1971); *Wiener v. California*, 404 U.S. 988 (1971).

[8] The Court "is about the most inappropriate Supreme Board of Censors that could be found". *Jacobellis*, 378 U.S. at 196 (Black, J., concurring).

[9] Contrary to the Government's contention, the Court did not stray from its rejection of a uniform, national standard in *Jenkins*. In *Jenkins*, this Court simply found that a jury could be instructed to apply "community standards without specifying what community". *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). *Jenkins* essentially recognized, in conformity with *Miller*, that a juror may rely on her own community's standards to define what a reasonable person may find offensive and need not rely on an abstract community's standard that would be specified by the court. *Id. Jenkins* never stood for the proposition that a jury could be instructed to follow a national hypothetical standard.

construe COPA to require reference to a hypothetical national adult standard would necessarily reinstate the confusion and uncertainty of the pre-*Miller* years, and would force this Court to resume the role of final arbiter of acceptable communications.

2. There is no consistent view among the nations' adults regarding which material is harmful to minors.

According to the government and its *amici*, we live in a nation where views are "reasonably constant among adults . . . with respect to what is suitable for minors." *See* Petitioner's Br. at 42-43 (citing H.R. Rep. No. 105-775, at 28 (1998)). This rosy view finds no support in the factual record below,[10] nor in readily accessible evidence drawn from previous court decisions and reported conflicts over various material deemed by some, but not by others, to be harmful to minors. *See, e.g., Miller*, 413 U.S. at 30 ("[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation."); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997). Quite the contrary, the factual examples set forth above show that no agreement exists even as to relatively mainstream literature, music, film, television and

[10] The Court of Appeals noted "we have before us *no evidence* to suggest that adults everywhere in America would share the same standards for determining what is harmful to minors." App. 31a.

theater, and that works ranging from the prime-time television drama *NYPD Blue* to the Pulitzer prize-winning play *Angels in America* have been challenged as offensive and unsuitable for minors in some communities, owing to their sexual content.

II. COPA Is Not The Least Restrictive Means Of Serving The Government's Expressed Purpose.

COPA, like CDA, criminalizes the communication of constitutionally protected non-obscene expression.[11] As a content-based regulation of protected speech, COPA is presumptively invalid, and is subject to the highest level of Constitutional scrutiny. COPA cannot be upheld unless the government can show that it is the least restrictive alternative available to achieve the compelling interest served by the statute. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). While protecting minors from potentially harmful content on the Internet is a laudable goal, and is unquestionably a compelling governmental interest, COPA fails to achieve that goal in a narrowly tailored and constitutional manner, and, accordingly, it cannot stand.

The government argues that COPA "is directed primarily to commercial pornographers who already put most of their material behind age verification screens," and that "[t]he principal effect of the Act is to require those commercial pornographers to put their teasers behind age verification screens as well." Petitioner's Br. at 21. Unfortunately, COPA's reach is much broader, as noted by the district court. *ACLU v. Reno*, 31 F. Supp. 2d 473, 480 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000) ("There is nothing

[11] "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

in the text of the COPA . . . that limits its applicability to so-called commercial pornographers.") Instead, COPA applies to "*any* communication for commercial purposes" on the Internet that includes "*any* material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). Therefore, as set out above, COPA broadly reaches on-line art galleries specializing in nude or partially clothed portraiture or displaying noted photographer Andres Serrano's "A History of Sex" series, or even on-line bookstores excerpting John Cleland's *Fanny Hill*.[12] Indeed, the breadth of COPA's reach was acknowledged by the Department of Justice in its candid, pre-enactment assessment of the then draft COPA, which noted that the "harmful to minors" standard is "[a]mong the more confusing or troubling ambiguities" in the statute. October 5, 1998, Letter from Department of Justice Letter to Honorable Thomas Bliley, Chairman of House Committee on Commerce (Plaintiffs' Memorandum of Law in Support of Temporary Restraining Order, Ex. A at 4).

Most importantly, as the district court noted below, there is evidence in the record that widely available filtering and blocking technology is a less restrictive means of protecting minors from potentially harmful content on the Internet. (*See* App. 94a). Indeed, use of filtering and/or blocking technology would shield minors from potentially harmful content on foreign-hosted Web sites, a laudable achievement that COPA cannot match. Thus, parents have the current ability to protect their children from potentially harmful content on the Internet, just as they have the ability to control access to adult oriented material that they may choose to bring into their homes. As the Third Circuit noted in a closely analogous situation, "in this respect, the decision a

[12] *See Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71 (1966) (Fanny Hill constitutes material that is 'harmful to minors').

parent must make is comparable to whether to leave sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it -- on the shoulders of the parent.[13] *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 788 (3rd Cir. 1990) (striking down a statute that required adults to obtain an access code before listening to sexually explicit recorded telephone messages).

[13] The government, however, can ,and indeed has, played an important role in facilitating and promoting user and parental education and empowerment. For example, Congress has required Internet Service Providers to provide access to filtering services and could provide funding for education, development and dissemination of user-based methods and technology. (*See* 47 U.S.C. § 230 *et seq.*).

CONCLUSION

The district court did not abuse its discretion by entering a preliminary injunction below, and on the present record (which will necessarily be expanded and clarified after discovery and trial are completed), the government appears unlikely to meet its burden to show that COPA is sufficiently narrowly tailored to survive the strict scrutiny required of laws that burden protected expression.

Respectfully Submitted,

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Dated: September 20, 2001

Supreme Court, U.S.
FILED
SEP 20 2001
OFFICE OF THE CLERK

No. 00-1293

In The

Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. ANA's members rely on advertising to market a wide array of goods and services. As the nation's principal community of commercial speakers, ANA has long been committed to First Amendment protection of truthful commercial speech for lawful goods and services designed to permit consumers to make informed and autonomous choices in the marketplace.

ANA has appeared routinely before this Court as an amicus curiae in commercial speech cases. In *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), this Court cited ANA's brief for its articulation of the position that truthful, nonmisleading commercial speech should be protected by a strict scrutiny standard instead of the current *Central Hudson*[2] test.

ANA also has appeared as an amicus curiae in non-commercial speech cases before this Court, when those

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

cases involved issues that might affect the rights of commercial speakers. Most pertinently, ANA appeared as an amicus in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (*"ACLU I"*), which involved a challenge of the Communications Decency Act ("CDA"), the predecessor statute to the Child Online Protection Act ("COPA") that is the subject of the instant action. In its brief in *ACLU I*, ANA debunked the government's argument for a "child protection" exception to the First Amendment.

ANA submits its brief in this follow-up case to *ACLU I* for two reasons. First, ANA asks the Court to be steadfast in its defense of the constitutional right of adults to communicate with each other, notwithstanding governmental claims that adult communications should be restricted in order to protect children. Any departure from this principle could endanger the speech rights of ANA's members who market goods or services that are lawful for adults, but that may be considered inappropriate for minors. Although ANA certainly is opposed to direct targeting of children by pornographers, COPA goes well beyond that legitimate purpose and unconstitutionally restricts the First Amendment rights of adults.

Second, ANA submits this brief because COPA presents an additional, direct threat to commercial speech rights that was not present in the CDA. Unlike the CDA, COPA discriminates against speech by commercial entities. COPA restricts indecent speech on the World Wide Web ("Web") only if it is posted for "commercial purposes," not if it is posted for noncommercial purposes. ANA urges this Court to make clear in deciding this case that government may not treat commercial enterprises as

if they were second-class citizens under the First Amendment.

SUMMARY OF ARGUMENT

Congress drafted and enacted COPA in the mistaken belief that it had received advance approval for COPA's speech restrictions from this Court in *ACLU I*. More to the point, Congress misinterpreted *ACLU I* as holding that the invalidated CDA could be redeemed, in part, by making it applicable only to indecent speech communicated for "commercial purposes," and eliminating its application to indecent speech communicated for noncommercial purposes. That reading of *ACLU I*, however, cannot be squared either with the language of the decision or this Court's commercial speech jurisprudence.[3]

The Court has made plain that commercial speech may not be restricted based solely on government's misguided belief that it is of low value in the hierarchy of protected speech. To the contrary, the Court's recent decisions increasingly have raised the level of constitutional protection accorded to commercial speech. In addition, by

[3] The communications restricted by COPA include, but are not limited to, those that fall within this Court's traditional definition of commercial speech, *i.e.*, "speech that does no more than propose a commercial transaction." *See United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2337 (2001). COPA also applies to speech that falls outside the category of commercial speech, such as the speech of plaintiffs herein. For purposes of this brief, however, ANA, as a trade association representing advertisers, focuses on COPA's impact on commercial speech.

crafting COPA so that it would discriminate against speech for commercial purposes, Congress created a constitutional infirmity that was not present in the CDA. More specifically, COPA violates the rule that speech restrictions must be effective in achieving the government's asserted goal, here the protection of minors from indecent materials on the Web. COPA's discriminatory restrictions cannot be effective because they have no application to the enormous amount of indecent speech published on the Web by noncommercial entities and by commercial entities located outside the United States. Thus, the government did not make COPA more constitutionally defensible when it limited it to restrict only speech for commercial purposes.

As its second line of defense, the government argues that COPA should receive reduced First Amendment scrutiny because Congress' goal was the protection of children. To the contrary, regardless of the compelling nature of the interest asserted by a government, its laws must withstand an undiluted degree of constitutional scrutiny. Moreover, when government's pursuit of an interest in protecting children simultaneously restricts the freedom of adults to communicate, this Court repeatedly has rejected the notion that adults may be reduced to reading only what is fit for children. For this additional reason, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. COPA IMPERMISSIBLY DISCRIMINATES AGAINST COMMERCIAL SPEECH

A. Congress Misunderstood *ACLU I* As Approving Restrictions on Communications Made for Commercial Purposes

COPA's unconstitutional restrictions on adult communications may be the result of a misunderstanding by Congress of this Court's decision in *ACLU I*. The Court discussed in *ACLU I* the fact that the CDA applied to both commercial and noncommercial communications. Congress misconstrued that discussion as endorsing a revision to the CDA that would make it applicable only to speech for commercial purposes. Before exploring the legislative history of COPA, however, it is important to analyze the two contexts in which the *ACLU I* Court deemed it relevant that the CDA applied to both commercial and noncommercial entities. This analysis of *ACLU I* will show the illogic of the government's reading of it as an endorsement of COPA's discrimination against commercial speakers.

ACLU I first discusses the fact that the CDA applied to both commercial and noncommercial entities in the context of distinguishing *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, this Court upheld New York's exercise of its police power to prohibit the sale of indecent magazines to minors. In *ACLU I*, this Court distinguished *Ginsberg* on four grounds, including that the statute upheld there applied only to commercial transactions, while the CDA contained no such limitation. 521 U.S. at 865, 877. This distinction was important because it

underscored the extraordinary – and unconstitutional – breadth of the CDA. But *ACLU I* does not address at all whether different constitutional infirmities would arise if the CDA were reworked to apply only to communications for commercial purposes, as Congress did in enacting COPA.

In the second context in which *ACLU I* distinguishes between commercial and noncommercial entities, the Court found that the CDA imposed a greater burden on the speech of noncommercial entities. The CDA, like COPA, provided an affirmative defense for a speaker who had restricted access by minors to indecent materials through measures designed to verify that the visitors to that speaker's Web site were adults. The Court found these affirmative defenses to be constitutionally inadequate for noncommercial speakers because "it is not economically feasible for most noncommercial speakers to employ such verification." 521 U.S. at 881. The Court did not state or imply, however, that the CDA's affirmative defenses would have been constitutionally adequate if they applied only to commercial speakers. Thus, *ACLU I* cannot logically be read as signaling the Court's advance approval of a revision to the CDA that would eliminate its application to noncommercial speakers.

Nonetheless, the legislative history of COPA demonstrates that Congress misunderstood *ACLU I* as holding that the CDA could be fixed, in part, by making it applicable only to commercial entities. The Senate Report states that the COPA bill was introduced "in response to," and "addresses the concerns of," this Court's decision in *ACLU I*. S. Rep. No. 105-225, at 2 (1998). More specifically, the Senate Report attributes to this Court the notion that

commercial Web sites should be regulated differently from noncommercial sites. *Id.* at 11. The Report states: "By limiting the scope of the bill to only commercial activity, the bill is brought into line with the previously outlined Supreme Court discussion in [*ACLU I*] of the contrast between the CDA and the New York statute upheld in *Ginsberg v. New York*." *Id.*

The House Report shows a similar misreading of *ACLU I*. The Report states that COPA "does not prohibit non-commercial activities over the Web, or over the Internet for that matter, and thus the concerns raised by the Supreme Court [in *ACLU I*] are no longer applicable." H.R. Rep. No. 105-775, at 13 (1998). More specifically, the Report misunderstands *ACLU I* as authorizing Congress to discriminate against the speech of commercial entities because, it is assumed, such entities could afford financially the implementation of COPA's affirmative defenses. *See id.* at 13-15.

Congress' misinterpretation of *ACLU I* has now been adopted by the Attorney General. In his brief, he argues that Congress "responded directly" to *ACLU I* by drafting COPA so that it applies only to commercial entities. Pet. Br. at 51. Further, the Attorney General echoes the Senate and House Reports by claiming that COPA improves on the CDA because COPA excludes from its coverage those speakers who might not be able to afford the costs of compliance with its affirmative defenses. *Id.* at 11 (citing H.R. Rep. No. 105-775).

The government's reading of *ACLU I* strays well beyond both the language of that decision and, as discussed below, established First Amendment principles.

The instant case presents this Court with an opportunity to clarify its decision in *ACLU I*, so that neither the federal government, nor any other government, will rely on it to pass laws that impermissibly discriminate against commercial speech. "[N]ow that the [discrimination] issue is squarely presented, it behooves" the Court to "reconcile" any ambiguous language in *ACLU I* with its established free speech jurisprudence. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 121 S. Ct. 1835, 1841 (2001); *see id.* at 1849 (Scalia, J., concurring) (declining to "enshrin[e]" errors that appear in the Court's "misleading dicta").

B. Congress Undervalued Commercial Speech When It Enacted COPA

The lesson that Congress mistakenly drew from *ACLU I* is that government has a relatively free hand to restrict the speech of commercial entities. To the contrary, this Court has explained that commercial speech receives substantial constitutional protection, as a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Moreover, a restriction on commercial speech cannot be justified by a "bare assertion" that such speech is of "low value." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993).

Based on its misunderstanding of *ACLU I*, and its undervaluing of commercial speech, Congress drafted

COPA so that it would apply only to persons who make communications for "commercial purposes." 47 U.S.C. § 231(1) (Supp. IV 1998). More specifically, COPA's speech restrictions apply only to persons who make the prohibited communications "with the objective of earning a profit as a result of such activities." § 231(e)(2)(B). In contrast, COPA does not restrict at all the ability of noncommercial entities or individuals to post materials harmful to minors on the Web.

COPA's discrimination between two categories of protected speech cannot be justified under this Court's precedents. It makes no difference that the category of speakers against whom Congress is discriminating – those who engage in speech for "commercial purposes" – includes persons engaged in commercial speech, a type of speech that does not receive full First Amendment protection under the Court's current jurisprudence. Indeed, the precedent that provides the clearest guidance on this issue involved a speech restriction that discriminatorily burdened commercial speech but not noncommercial speech.

That decision is *City of Cincinnati v. Discovery Network, Inc.* The ordinance at issue in *Discovery Network* banned newsracks dispensing commercial handbills in order to advance governmental interests in safety and esthetics, but did not affect newsracks dispensing noncommercial materials. The Court invalidated the ordinance in language that applies equally here:

> The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more

> valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.
>
> We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

507 U.S. at 418-19.

Like the Cincinnati City Council, Congress apparently assumed that commercial speech is of low value and may be easily restricted. That assumption was flawed when this Court decided *Discovery Network* in 1993, and is even more clearly incorrect under the Court's more recent commercial speech decisions. Those decisions have raised the value of commercial speech in the First Amendment hierarchy, so that discrimination against commercial speech, based solely on an argument that it is of low value, cannot possibly be justified today.

Since *Discovery Network* was decided in 1993, the Court has clarified and thereby strengthened the First Amendment's protection of commercial speech. For example, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court expressly overruled an earlier decision that some understood as requiring courts to defer to legislatures that restricted commercial speech. That earlier decision, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), was described in *44 Liquormart* as "erroneously perform[ing] the First

Amendment analysis," 517 U.S. at 509 (Stevens, J., principal opinion), and as having been replaced by a "more searching[ ]" examination of commercial speech restrictions, *id.* at 531 (O'Connor, J., concurring).

Further, in 1999, the Court raised the possibility that the *Central Hudson* test used for reviewing restrictions on commercial speech should be replaced with a "more stringent" test, recognizing that various legal thinkers, including "reasonable" judges, have adopted that position. *Greater New Orleans*, 527 U.S. at 184; *see Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2430 (2001) (Kennedy, J., concurring) (expressing a "continuing concern[ ] that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech"); *id.* at 2431 (Thomas, J., concurring) (stating that "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial' "). Particularly in light of this Court's recent strengthening of commercial speech protection, Congress was mistaken in believing that it could fix the CDA by making it applicable only to the speech of commercial entities.

In short, government may not discriminate against commercial speakers (and their adult audiences) based on a misguided notion that their speech is of low constitutional value. As the Court has stated, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765,

777 (1978). The court of appeals properly held the government to a substantial burden of proof to justify its restriction on the valuable speech of commercial entities, and found that the burden had not been met.

C. Congress' Discrimination against Commercial Speakers Undermines Its Ability to Demonstrate the Effectiveness of COPA

COPA's disparate treatment of communications made for commercial and noncommercial purposes violates the Constitution for an additional reason. Speech restrictions cannot withstand First Amendment scrutiny if they are ineffective in achieving the government's asserted goal. COPA must be deemed ineffective in achieving its goal of protecting children from indecent materials available on the Web because (unlike the CDA) it excludes from its coverage the enormous amount of indecent speech published on the Web by noncommercial entities and by commercial entities located outside the United States.

As stated in *Discovery Network*, it is "impermissible" for government to enforce a speech restriction that distinguishes between commercial and noncommercial speech when "the distinction bears no relationship *whatsoever* to the particular interests that the [government] has asserted." 507 U.S. at 424 (emphasis in original). In *Discovery Network*, the challenged municipal ordinance, which prohibited newsracks containing commercial handbills, but permitted those containing noncommercial publications, could not be justified based on the city's asserted interests in esthetics and safety. All newsracks were "equally at fault," and, therefore, the city's partial

ban on newsracks could not satisfy the constitutional test of effectiveness. *Id.* at 426.

This same principle has been applied in cases involving inconsistent restrictions within the category of commercial speech. For example, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court invalidated a federal law that, in the name of promoting temperance, prohibited the disclosure of alcohol content on beer labels, but permitted such disclosure on the labels of wine and spirits. The Court held that the challenged law could not be effective because of the "overall irrationality" of the regulatory scheme. *Id.* at 488.

Similarly, in *Greater New Orleans*, the Court struck down a ban on broadcast advertising for casinos, ostensibly designed to reduce demand for casino gambling, that contained an exemption for casinos owned by Native Americans. The Court stated, "the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear. . . . " *Id.* at 195; *see also Carey v. Brown*, 447 U.S. 455, 465 (1980) (holding that New York's interest in residential privacy could not sustain its statute permitting labor picketing, but prohibiting nonlabor picketing, when nothing in that content-based distinction had any bearing on privacy).

Like the speech restrictions challenged in *Discovery Network*, *Coors Brewing*, and *Greater New Orleans*, COPA distinguishes among the indistinct. While COPA restricts indecent communications made on the Web by commercial entities located in the United States, it has no impact on children's access to indecent materials posted on the

Web by noncommercial entities or by commercial entities located outside the United States. The government has not made any attempt to show how COPA could be effective in light of its inconsistent treatment of communications that, presumably, are equally, if not more, harmful to children.

The legislative history of COPA actually supports the conclusion that the government could not make the necessary showing of effectiveness. For example, in order to prove that COPA would be effective, the government would have to show that a substantial portion, if not the majority, of indecent materials on the Web are posted by commercial entities located in the United States. But the House Report admits that "no reliable statistics exist on the world-wide distribution of pornography over the Internet." H.R. Rep. No. 105-775, at 20. Without such statistics, the government cannot satisfy its burden to prove the effectiveness of COPA.

Further, the government could not justify COPA unless the indecent materials posted on the Web by noncommercial entities are either small in quantity or significantly less harmful to youth than materials posted by commercial entities. Again, however, the House Report cuts against the constitutionality of COPA. The Report states that "a large quantity of information" harmful to minors "will still be available" on noncommercial sites on the Web and on the Internet. *Id.* at 13. Thus, the legislative history of COPA constitutes an admission that the government has no idea what percentage of materials inappropriate for minors will be eliminated by COPA, or

whether the eliminated materials are more (or less) harmful than the materials that will continue to be available on the Web and the Internet.

In sum, the government cannot satisfy its constitutional burden to prove that COPA would be effective. Just as in *Discovery Network*, the government has failed to show that the amount of allegedly harmful speech to be eliminated by COPA would be substantial enough to materially advance the asserted governmental goal. 507 U.S. at 418. Also as in *Discovery Network*, the government has not demonstrated a basis for COPA's distinction between speech by commercial and noncommercial entities that is relevant to its asserted interest. *Id.* at 428. For this additional reason, COPA cannot withstand scrutiny under the First Amendment.

II. THE GOVERNMENT MISTAKENLY ARGUES THAT THE FIRST AMENDMENT APPLIES WITH LESS FORCE WHEN THE ASSERTED JUSTIFICATION FOR CENSORSHIP IS THE PROTECTION OF CHILDREN

The government seeks to reduce the judicial scrutiny applied to COPA based not only on the nature of the speakers whom it restricts (*i.e.*, commercial entities), but also based on the nature of the governmental interest that COPA purportedly serves. In the government's mistaken view, the First Amendment should be applied less strictly here because the asserted legislative purpose for COPA is the protection of children. Pet. Br. at 48-49. According to the government, any burden that COPA imposes on speech must be balanced against its "compelling interest in protecting children from pornographic material that is

harmful to them, even if the material is not obscene by adult standards." *Id.* at 48.

This is not the first case, nor likely will it be the last, that presents a conflict between First Amendment rights and a government's claim that it must restrict those rights in order to protect children. Prof. Catherine J. Ross has explained, in a passage quoted by the court of appeals, why legislatures continually adopt such speech restrictions: " 'When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles.' " *Ashcroft v. American Civil Liberties Union*, No. 00-1293, *petition for cert.*, app. ("Pet. app."), at 38a n.25 (quoting Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 521 (2000)).

In contemporary society, where adults and minors are often exposed to the same media, it is increasingly difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. But this conflict between competing interests is not a new problem for the Court. In a line of cases decided during the past 44 years, the Court consistently has resolved the conflict in favor of protecting speech.

In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth. . . . " 352 U.S. at 381. The Court held

that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989). At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." After recognizing the government's compelling interest in protecting children, the Court made plain that this interest cannot diminish the free speech rights of adults. 492 U.S. at 126. In reliance on *Butler* and *Bolger*, the Court invalidated the ban because it "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.

The most pertinent application of this general principle appears in *ACLU I*. There, the Court struck down the CDA, which was the predecessor statute to COPA and purportedly was designed to serve the same governmental interest in protecting children from indecent speech. In language equally applicable here, the Court

explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *ACLU I*, 521 U.S. at 875 (citations omitted).

Most recently, in *Lorillard*, the Court struck down restrictions on tobacco advertising that Massachusetts claimed were necessary to protect children. The Court recognized that government has a compelling interest in preventing underage tobacco use, but explained that the strength of that interest could not reduce government's constitutional burden to prove that its speech restriction was narrowly tailored. *Id.* at 2427.

The line of cases rejecting a "child protection" exception to the First Amendment stretches from *Butler* in 1957 to *Lorillard* in 2001. This principle of constitutional law is now so firmly established that it should be virtually impervious to challenge. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) (striking down federal law intended to shield children from seeing indecent images on cable television because the restrictions impermissibly burdened communications with adults); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (citations omitted) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has "not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for children."); *id.* at 759 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

The government cannot avoid the rule of *Butler* and its progeny by relying (as it did in *ACLU I*) on this Court's inapposite decision in *Ginsberg*. In *Ginsberg*, the defendant owner of a stationery store who sold an indecent magazine to a 16-year-old boy did not suggest that New York's ban on such sales to youths under the age of 17 affected his ability to sell to adults, and clearly it did not. *Id.* at 634. Thus, *Ginsberg* was concerned solely with New York's exercise of its police power to protect minors under 17, not as here, a conflict between that police power and the First Amendment rights of adults. The criminal statute in *Ginsberg* could be and was upheld based on mere rational basis review. *Id.* at 643.

In contrast to the criminal statute at issue in *Ginsberg*, COPA does impede constitutionally protected communications among adults. Whereas an adult does not need to pay an entrance fee at the door of a stationery store if he wishes to browse for adult magazines, COPA contemplates such an entrance fee for an adult who wishes to browse the Web for adult materials.

More specifically, the government focuses on a service called Adult Check, which would provide an Adult ID to a consumer at a price of $16.95 per year. Pet. Br. at 48. Under COPA's affirmative defenses, a commercial Web site operator who posts indecent materials could avoid liability by requiring visitors to present an Adult ID before viewing the site's indecent materials. But the imposition of such an entrance fee would impede impermissibly communications among adults. Indeed, the government itself concedes that some adults will be "deterred from obtaining an Adult ID." Pet. Br. at 48.

Butler and its progeny prohibit such an abridgment on adult-to-adult speech.

On a related point, government's asserted interest in protecting children from indecent speech cannot withstand scrutiny when a less speech-restrictive alternative is available, and government has not shown that alternative to be ineffective. *Playboy Entertainment Group*, 529 U.S. at 816. Here, the district court found that such an alternative exists: "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. app. at 94a. Apart from the First Amendment, there is another reason why blocking or filtering technology is preferred over governmental regulation. Such technology allows parents, rather than government, to decide whether to allow their children, including those as old as 16, unrestricted access to indecent speech. It is a "fundamental right" of parents to make such decisions concerning the upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The Court's admonition in *Butler* against burning down the house to roast the pig applies with special vigor when the "house" in question is the Internet. This newly-constructed medium, although private, is open to all Americans. Once a speaker enters the Internet, he or she will find a vast interactive community. The district court found in 1999 that approximately 70.2 million people of all ages use the Internet in the United States alone. Pet. app. at 56a. The pervasiveness and accessibility of a

medium such as the Internet, characteristics that the government identifies as supporting greater censorship, in fact justify rigorous First Amendment protection. *See id.* The constitutional rights of adults to communicate with one another must be especially free in those media that allow for the most effective communications.

CONCLUSION

The judgment of the court of appeals should be affirmed, either on the ground relied on by that court, or, as discussed in this brief, because COPA impermissibly undervalues commercial speech and would be ineffective in achieving the government's asserted goal.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 20 2001
OFFICE OF THE CLERK

No 00-1293
In the Supreme Court of the United States

JOHN ASHCROFT, Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION, et al.,
Respondents

On Writ of Certiorari
to the U.S. Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEXUALITY, THE INSTITUTE FOR ADVANCED STUDY OF HUMAN SEXUALITY, THE SEXUAL HEALTH NETWORK, THE AMERICAN BOARD OF SEXOLOGY, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE FIRST AMENDMENT PROJECT, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are organizations devoted to intellectual freedom and to scholarship and education in the field of human sexuality. They are concerned about the impact of the Child Online Protection Act (COPA) on their ability, and the ability of others involved in sexuality research and advocacy, to communicate, educate, and exchange information on the World Wide Web. They are additionally concerned that censorship not be imposed on this vital new medium because of the mistaken assumption that minors are harmed by exposure to material with sexual content. They submit this brief in order to assist the Court in determining whether the government has met its burden of establishing a compelling interest in suppressing sexual communications on the Web.[1]

STATEMENT OF THE CASE

COPA criminalizes any communication "for commercial purposes" by means of the World Wide Web if it "is available to any minor" and "includes any material that is harmful to minors." 47 U.S.C. 231(a)(1)(Supp. V 1999). It defines "harmful to minors" as any picture, writing, or other communication depicting or describing "an actual or simulated sexual act or sexual contact," or "lewd exhibition of the genitals or post-pubescent female breast," if it is "patently offensive" and "prurient" with respect to minors according to "contemporary community standards," and if it lacks "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The legal standard is a variant on the one approved by this Court 33 years ago in the

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party other than the *amici*. See the appendix for a description of the *amici*.

context of the sale of "girlie magazines" to a teenage boy. *Ginsberg v. New York*, 390 U.S. 629 (1968).

Seventeen publishers of sexual content on the Web challenged COPA in federal district court in Philadelphia. Following the precedent set in *Reno v. ACLU*, 521 U.S. 844 (1997), they argued primarily that COPA is overbroad because it essentially reduces the adult population of the Internet to reading and publishing only what is considered fit for children; they also asserted that the law is unconstitutionally vague and violates the First Amendment rights of older minors. The court held a preliminary injunction hearing at which a number of Web publishers testified regarding material on their Web sites that could be considered prurient, patently offensive, and lacking in value for minors according to the standards of some American communities.

For example, poems and stories posted on the Web site of the plaintiff A Different Light Bookstore describe adolescent and young adult sexuality in graphic terms. Jt.App. 610-12. Plaintiff Salon.com's "Sexpert Opinion" column by Susie Bright contains explicit descriptions of sexual acts. *Id.*, 617-20. The "Kama Sutra" screensaver from download.com "contains 40 explicit drawings based on the ancient Indian text on sexual pleasures and techniques." *Id.*, 642. The Sexual Health Network, which is directed to the sexual needs and concerns of disabled individuals, contains extensive material about sexual positions, sex toys, oral sex, and masturbation, in addition to contraception, fertility, erectile dysfunction, and numerous other sex-related subjects. *Id.*, 672-88; see also Cert. App. 63a-67a (district court's findings of fact).

Witnesses also testified that minors are an important part of their audience. Norman Laurilla of A Different Light Bookstore explained that its offerings are particularly helpful for gay and lesbian youth. Jt.App. 112. Dr. Mitchell Tepper

of the Sexual Health Network stated that although much of the information on the network's Web site could be helpful to minors, "I have to believe discussion of masturbation, oral sex, anal sex, descriptive positioning, all may be construed as 'pandering to the prurient interest of minors,'" in violation of COPA. *Id.*, 343. Thomas Reilly of plaintiff-Planetout.com testified that minors are welcomed on the site, even though "many people would find just being gay at all, harmful to minors in their definition of it," because the site "provides peer support, sexual health information and a place for self-expression for people who are questioning their sexuality or who are, in fact, gay or lesbian, bisexual, transgender and are teenagers." *Id.*, 355, 357, 363-54. Planetout also provides access to the sexually explicit Internet radio show, "Dr. Ruthless." *Id.*, 656.

The district court granted preliminary relief on the ground that the plaintiffs would suffer irreparable harm if COPA were not enjoined, and that the government was not likely to "meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors" to expression that could fall within the "harmful to minors" definition. Cert. App. 93a, 95a. Quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the court stated that Congress clearly has a compelling interest in shielding minors "from materials that are not obscene by adult standards"; but it also noted that "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection." Cert. App. 90a, 97a.

The court of appeals affirmed on different grounds. It found that COPA was likely unconstitutional because of its reliance on "'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." Cert.App. 21a. The contem-

porary community standards test is fatally overbroad, the circuit ruled, because the Internet is not "geographically constrained," and Web publishers cannot readily identify or control the locales from which readers and viewers may access their communications. In consequence, Internet speakers will be forced to self-censor to meet the standards of "'the most restrictive community.'" *Id.*, 24a, quoting *Reno*, 521 U.S. at 877-78.

The court of appeals also noted the age-related overbreadth of COPA -- that is, the restrictions that the law imposes on older minors in the presumed interest of protecting younger ones. To avoid liability, the court said, Web publishers would either have to self-censor "severely" or implement an age verification system behind which "vast amounts of material" would be hidden. Such a system

> would completely bar access to those materials to all minors under seventeen – even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

Id., 24a-25a.

SUMMARY OF ARGUMENT

I. Sexuality experts agree that there is no empirical basis to believe that minors are harmed by exposure to sexually explicit words or images. Therefore, the government has not established a compelling state interest that would justify COPA. Little research has been done on minors' exposure to pornography, and what research exists does not suggest psychological harm. Even studies of the effects of mainstream entertainment with sexual content on minors' attitudes and behavior have been inconclusive. In one of the rare cases in which expert testimony was actually taken on

this issue, the three-judge court in *Playboy Entertainment Group v. United States*, 30 F. Supp.2d 702 (D.Del. 1998), aff'd, 529 U.S. 803 (2000), found no evidence of harm to minors should they happen upon (or deliberately seek out) sexually explicit cable television programming.

II. The government's argument that COPA is necessary because pornography does not provide children "with a normal sexual perspective" and "impairs their moral development" is not an acceptable basis for a criminal censorship law. In the absence of empirical proof of harm, the government mistakenly assumes the power to impose its sexual and moral viewpoint on minors of all ages, as well as on a vast array of Web publishers. Although *Ginsberg v. New York* upheld a "harmful to minors" law based largely on legislators' asserted concern with the "moral development of youth," *Ginsberg* applied only a deferential rational-basis test to the New York law. Under the proper, compelling state interest test that all parties acknowledge applies in this case, the viewpoint-discriminatory argument that COPA is justified because of governmental concerns about minors' "sexual perspective" must fail.

III. COPA is void for vagueness because there is no way to identify what words or images would be considered sufficiently prurient, offensive, and lacking in serious value for minors to violate the law in any particular community. As the record shows, there is no clear dividing line in contemporary culture between pornography, which the government says is prohibited by COPA, and other sexually explicit expression that could be considered prurient, offensive, and without serious value for minors. This problem is exacerbated by the wide range of ages and maturity levels covered by the law. What is patently offensive, appeals to a prurient interest, or lacks serious value for a 6 year-old is far different from what is offensive, prurient, or lacking in value for a

teenager on the verge of adulthood. And to construe COPA to apply only to expression that is thought to lack serious value for a "a legitimate minority of older minors," as the government suggests, would both eviscerate the law and make it virtually indistinguishable from the obscenity standard that applies to adults.

ARGUMENT

I THERE IS NO EMPIRICAL BASIS TO BELIEVE THAT MINORS ARE HARMED BY EXPOSURE TO SEXUALLY EXPLICIT WORDS OR IMAGES

It is so often assumed that minors are harmed by exposure to "patently offensive" sexual words, ideas, or images that political leaders and even courts rarely investigate or analyze the assumption. In fact, scholars and educators in the field of sexuality generally agree that there is no empirical basis to believe explicit sexual material, including pornography, causes psychological harm except perhaps in isolated cases where a young person has already been taught to be ashamed or guilt-ridden about sexual matters.

There is no body of scientific evidence establishing that minors are harmed by reading or viewing pornography. As 16 experts explained in an *amici curiae* brief to this Court in *United States v. Playboy Entertainment Group*, "most scholars in the field of sexuality agree that there is no basis to believe sexually explicit words or images ... in and of themselves cause psychological harm to the great majority of young people."[2] As Professor Pepper Schwartz recently told

[2] Brief *Amici Curiae* of Sexuality Scholars, Researchers, Educators and Therapists in Support of Appellee in *United States v. Playboy Entertainment Group*, No. 98-1682 (Oct. Term 1998), 8; see also Testimony of Jeffrey McIntyre of the American Psychological Association to the Nat'l Research Council, Nat'l Academy of Sciences, Computer Science and Telecomm'ns Bd., Committee to Study Tools and Strategies for Protecting Kids From Pornography and Their Applicability to Other Inappropriate Internet Content (hereafter, "Nat'l Research Council") (Oct. 18, 2000) ("the state of psychological research in the area of children and exposure to pornography is limited").

the National Research Council's Committee "to Study Tools and Strategies for Protecting Kids From Pornography and Their Applicability to Other Inappropriate Internet Content," "there is no scientific evidence that explicit pictures -- however distasteful and disturbing -- cause developmental damage to a young person's sexuality or personality."[3]

In 1986, the Surgeon General's Workshop on Pornography and Public Health concluded that there is no scientific basis to believe that minors are adversely affected by pornography. Indeed, it noted that many psychologists believe young children are unaffected by pornography because they lack "the cognitive or emotional capacities needed to comprehend it." In the end, these experts said, "it is really rather difficult to say much definitive about the possible effects of exposure to pornography on children."[4] The more widely publicized majority report that same year of the Attorney General's Commission on Pornography (the Meese Commission) did not disagree. The Meese Commission acknow-

[3] Testimony of Dr. Pepper Schwartz to the Nat'l Research Council (Mar. 7-9, 2001).

[4] Edward Mulvey & Jeffrey Haugaard, *Surgeon General's Workshop on Pornography and Public Health* (Washington, DC: Dep't of HHS, June 22-24, 1986) (manuscript ed.), 61-62.

ledged that its concerns about minors' access to pornography were based on morality, not science.[5]

In the *Playboy Entertainment* case, expert witnesses for both the government and Playboy testified that there is no empirical body of evidence of harm to minors from exposure to pornography. Dr. Richard Green, founding president of the International Academy of Sex Research, testified that none of the available literature – including comparisons of the amount of erotica available in different countries, studies of sex offenders, laboratory experiments on pornography and violence, clinical experience worldwide, and research on people who as children had witnessed the "primal scene" of sexual intercourse – supports the notion that exposure to sexual explicitness is psychologically harmful to youth. In 25 years of clinical practice, Dr. Green had not encountered psychological problems stemming from minors' viewing pornography.[6]

The government in *Playboy Entertainment* initially attempted to establish harm to minors by offering testimony from the director of a clinic for abused children. The three-judge trial court rejected this testimony as weak, anecdotal,

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[5] Attorney General's Commission on Pornography, *Final Report* 303 (Washington, DC: Gov't Printing Office, 1986) ("[t]o a number of us, the most important harms must be seen in moral terms. ... Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm").

[6] Transcript, *Playboy Entertainment Group v. United States*, No. 96-94 (D. Del. Mar. 5, 1998), 361, 365-67, 397.

and "possibly misleading."[7] Later, the government presented a new expert witness, Dr. Elissa Benedek, who opined that sexually explicit television might produce an assortment of harmful effects but acknowledged that she knew of no scientific literature or clinical studies supporting her belief, and that in her 30 years of psychiatric practice, nobody had come to her with a complaint about sexual images.[8]

The judges were unimpressed with Dr. Benedek's opinion. "We are troubled," they wrote, "by the absence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children." *Playboy Entertainment*, 30 F. Supp.2d at 716.

Although there is no body of empirical research demonstrating harm to minors from reading or viewing pornography, some studies have explored relationships between youngsters' attitudes or behavior and their viewing of mainstream media with sexual content. These studies have limited relevance to pornography, which is a markedly different genre from mainstream entertainment. More important, however, the studies have not demonstrated harmful effects.

For example, an experiment in 1980 asked 75 adolescent girls, half of them pregnant, about their television viewing habits. Overall, the pregnant ones watched more TV soap operas and were somewhat less likely to think that their favorite characters would use contraceptives. But as the

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[7] *Playboy Entertainment Group v. United States*, 945 F. Supp. 772, 786 n. 25 (D. Del. 1996), aff'd mem., 520 U.S. 1141 (1997).

[8] *Playboy* Transcript, 445-81 (Mar. 5, 1998); see *Playboy Entertainment Group*, 30 F. Supp.2d at 710-11.

authors said, it is "difficult to know if television portrayals are encouraging adolescents to be unrealistic about sexual relationships [that is, not using contraceptives], or if unrealistic adolescents identify with the glamorized TV portrayals."[9] Similarly, a 1991 study found that of 391 junior high school students, those who watched sexier TV shows were more likely to have become sexually active in the preceding year. Although "having had intercourse appeared to be related to seeking sexual content on television," the researchers were "unable to determine which came first – sexual intercourse or a proclivity for viewing sexual activity on television."[10]

Indeed, a third variable such as sexual precocity may account for any correlation between sexual activity and viewing of sexually oriented TV programming. Psychologist Jeffrey Arnett, documenting a correlation between adolescents' reckless conduct and preference for violent music, found just such an independent factor – "sensation seeking"-- to account for both the preference and the conduct. Arnett added that "adolescents who like heavy metal music listen to it especially when they are angry and that the music has the

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[9] Charles Corder-Bolz, "Television and Adolescents' Sexual Behavior," 3 *Sex Educ. Coal'n News* 3, 5 (1981).

[10] Jane Brown & Susan Newcomer, "Television Viewing and Adolescents' Sexual Behavior," 21 *J. of Homosexuality* 77, 84, 88 (1991); see also *Risking the Future - Adolescent Sexuality, Pregnancy, and Child-bearing* (Cheryl Haynes, ed.) (Washington DC: Nat'l Academy Press, 1987), 249 (noting that no study "has convincingly linked program content and exposure to adolescent sexual attitudes and behavior"); American Academy of Pediatrics, "Children, Adolescents, and Television," 96 *Pediatrics* 786 (1995) ("there is no clear documentation" that the relationship between TV viewing and sexual activity "is causal").

effect of calming them down and dissipating their anger."[11]

Other correlational studies have found inverse relationships between youthful exposure to pornography and sex offending. That is, sex offenders, both adolescent and adult, generally have less, not more, exposure to pornography as youths.[12] Based on these correlations, some experts have suggested that sex offending is causally related not to youthful exposure to sexually explicit material but to its opposite: youthful repression, conflict, and guilt.[13] Indeed, explicit

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[11] Jeffrey Arnett, "The Soundtrack of Restlessness - Musical Preferences and Reckless Behavior Among Adolescents," 7 *J. Adol. Rsrch* 313, 328 (1992); see also Lawrence Kurdek, "Gender differences in the psychological symptomatology and coping strategies of young adolescents," 7 *J. Early Adol.* 395 (1987) (notlng that heavy metal music is useful to some adolescents in purging anger).

[12] Judith Becker & Robert Stein, "Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?" 14 *Int'l J. Law & Psychiatry* 85 (1991); Milton Diamond & Ayako Uchiyama, "Pornography, Rape, and Sex Crimes in Japan," 22 *Int'l J. Law & Psychiatry* 1, 15-19 (1999); Paul Gebhard *et al.*, *Sex Offenders* 670-78 (NY: Harper & Row, 1965); Ira & Harriet Reiss, *Solving America's Sexual Crisis* 61-83, 147-51 (Amherst, NY: Prometheus Books, 1997); Michael Goldstein & Harold Kant, *Pornography and Sexual Deviance* 139-44, 147 (Berkeley: U. Cal. Press, 1973) (evidence "suggests that a reasonable degree of exposure to erotica, particularly during adolescence, reflects a high degree of sexual interest and curiosity that correlates with adult patterns of acceptable heterosexual practice").

[13] Diamond & Uchiyama, *supra* n. 12; Reiss & Reiss, *supra* n. 12; Kathryn Kelley *et al.*, "Three Faces of Sexual Explicitness - the Good, the Bad, and the Useful," in *Pornography - Research Advances and Policy Considerations* 67 (Dolf Zillmann &

materials have been used therapeutically in treating sexually delinquent teenagers and pre-adolescents, and in family therapy generally.[14]

A recent study by Professor Joanne Cantor and her colleagues tried to assess the effects on minors of sexual material by asking college students for their memories of TV shows or movies "depicting sex or sexual issues" that they had seen as children or adolescents. The researchers found no clear, consistent effects. About half of the subjects who viewed "sexual content" as adolescents or earlier "evaluated the experience as both positive and negative ... Younger children's responses were significantly more likely to be characterized by interest or confusion; those of older children were significantly more likely to be characterized by disgust or anger."[15] None of the results suggested serious or permanent psychological harm.

Jennings Bryant, eds.) (Hillsdale, NJ: Lawrence Erlbaum, 1989).

[14] William Seabloom *et al.*, "A 15 to 23 Year Retrospective Study of Participants in Personal/Social Awareness, An Intensive Outpatient Treatment Program for Adolescents in Sexual Crisis," paper presented to the 33d Annual Conference of the American Ass'n of Sex Educators, Counselors and Therapists (May 2-6, 2001); William Seabloom, "Sexual Fantasy as a Positive Aid in the Treatment of the Sex Offender," paper presented to the Annual Meeting of the Society for the Scientific Study of Sexuality (Sept. 19–22, 1985); Pearl & Lois Rosenberg, "A Group Experience in Sex Education for the Family," 26 *Int'l J. of Group Psychotherapy* 236 (1976).

[15] Joanne Cantor, Abstract - "Autobiographical Memories of Exposure to Sexual Media Content," paper presented to the Society for Research in Child Development Conference, Minneapolis (Apr. 20, 2001).

In the final analysis, it is unclear whether quantitative social science techniques -- correlational studies, laboratory experiments -- can ever identify, with any degree of certainty, the precise causes of "harmful" attitudes or behavior in an area as complex and multi-faceted as human sexuality. Certainly, anecdotes, or isolated clinical reports, do not amount to proof of harm sufficient to satisfy the government's burden of demonstrating a compelling need for COPA.[16]

In the absence of evidence, it might be argued that psychological harm from "patently offensive" material should be presumed, at least for young children. Most sexually explicit material *is* obviously age-inappropriate for young children, and might be confusing and troubling to some of them. But such confusion does not amount to serious psychological harm of the magnitude that would justify a criminal censorship law such as COPA. At the end of the day, problems of confusion about sexuality are best dealt with by parents, counselors, and educators.

II COPA IS NOT JUSTIFIED BY THE GOVERNMENT'S ASSERTION THAT PORNOGRAPHY LACKS "A NORMAL SEXUAL PERSI ECTIVE"

Recognizing the absence of evidence that sexual expression is psychologically harmful to minors, the government argues that suppression is nevertheless necessary to promote youngsters' "moral development" and "normal sexual perspective." Pet. Br., 3, 17 (typescript). The argument is view-

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[16] Identifiable harm to minors – for example, from sexual predators on the Internet – is not caused by pornography. On the contrary, it is usually facilitated by non-pornographic solicitations in chat rooms and the like, and thus will not be prevented by COPA.

point-discriminatory, arguably mistaken, and in any event insufficient to justify a criminal censorship law under the strict scrutiny standard that the government concedes is required in this case. *Id.*, 23.

First, the government's effort to suppress speech because of disagreement with its perceived message -- here, an "abnormal" sexual perspective -- is the essence of viewpoint discrimination. As this Court held in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995), and reiterated in *Good News Club v. Milford Central School*, 121 S.Ct. 2093, 2100 (2001), discrimination against a religious perspective concerning what is proper or moral conduct is viewpoint-based. See also *Kingsley Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959) (viewpoint that adultery may be proper behavior); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986) (discrimination against viewpoint that subordinates women in sexual situations). Because the First Amendment severely limits the government's power to suppress disfavored perspectives on political, social, or sexual matters, viewpoint discrimination is the most suspect form of governmental restriction on speech. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

Second, the government does not specify how it arrived at its conclusion that the expression targeted by COPA lacks a normal sexual perspective and impairs the moral development of adolescents and children. Moral and cultural attitudes toward sexuality vary widely across the population of American parents and educators. Many believe that a knowledge of sexual facts (even the seamier ones), and an affirmative attitude toward sexual pleasure, are positive, normal, and moral. Therapists use explicit media in treating sexual problems among youths as well as adults. Many experts believe that messages of disapproval and taboo are psychologically harmful, and have found lack of sexual fantasizing, not its opposite, to correlate with sexual dysfunction.[17] Given that it is not even clear what different communities will find prurient, patently offensive, and without serious value for minors,[18] it can hardly be said that all of this potentially banned material is immoral or conveys an "abnormal" perspective.

As Professor Pepper Schwartz explained to the National Research Council, explicit sexual information can help empower youngsters to "navigate the rocky shoals of adolescent sexuality." If minors are "comfortable with sexuality"

> because they understand it and have access to images that satisfy a lot of their curiosity, I think there is every reason to believe that the random images of more bizarre sexuality will not be elemental in the formation of their sexual lives.[19]

Professor Schwartz's testimony suggests that education is a more effective, and much less restrictive, means of accomplishing the government's interest in providing youngsters with a "normal sexual perspective" and promoting their moral development than is a censorship law such as COPA.

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[17] E.g., Diamond & Uchiyama, *supra* n. 12; Becker & Stein, *supra* n. 12; Gebhard, *supra* n. 12; Eberhard & Phyllis Kronhausen, *Pornography and the Law* 273-74 (NY: Ballantine, 1959).

[18] See §III, *infra*.

[19] Schwartz testimony, *supra* n. 3; see also *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 10-11 (Washington, DC: U.S. Dept of HHS, 2001) (stressing importance of sexuality education).

The government's generalized concern with moral values may have sufficed in *Ginsberg* to satisfy the rational basis test,[20] but it is not sufficient to establish a compelling state interest, and a criminal law is certainly not the least constitutionally burdensome means of addressing the government's concern. In a society that embraces a wide range of views and attitudes about sexuality, in which most high school students are sexually active,[21] and in which the sexual activities of a recent President were the subject of an explicit report to the United States Senate, the government cannot justify imposing its viewpoint on sexual morality by suppressing any sexual material that one or another local community may deem patently offensive, prurient, and lacking in serious value for minors.[22] Even assuming that promoting minors' moral development is a compelling state interest and that COPA would advance that interest, there are less restrictive and more effective ways of accomplishing it, through comprehensive sexuality and media-literacy education.

III COPA IS VOID FOR VAGUENESS

Even if the government had the power to suppress disfavored viewpoints about sexuality in the interest of minors' moral development, COPA is unconstitutionally vague. There is no way for publishers to know what words or images will be considered prurient, patently offensive, and lacking in serious value for minors of any particular age. This is so for three reasons.

First, with no geographic community specified, and with Web materials accessible all over the world, publishers cannot know what community standard of offensiveness and prurience will apply. In contrast to the situation in *Sable*,

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[20] *Ginsberg*, after recognizing the absence of empirical evidence of harm to minors, noted a psychiatric theory of identity formation as a justification for upholding New York's law. The psychiatrist in question conceded that "'the reading of pornography [is] unlikely to be per se harmful,'" but theorized that the *permitting* of the reading of pornography might be "'potentially destructive. ... The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification process.'" 390 U.S. at 642 n. 10, quoting Willard Gaylin, "The Prickly Problems of Pornography," 77 *Yale L.J.* 579, 592-94 (1968). This psychiatric theory, along with the New York legislature's concern with "the ethical and moral development of youth," was enough to satisfy *Ginsberg*'s rational basis test. But whatever the validity of Dr. Gaylin's notion that a message of disapproval is important for sexual development, it is both dubious as a constitutional matter, see *Carey v. Population Serv. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring), and too speculative to satisfy strict scrutiny. See also Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* 71-74 (NY: Hill & Wang, 2001).

[21] See Schwartz Testimony, *supra* n. 3; Centers for Disease Control, "Current Trends: Premarital Sexual Experience Among Adolescent Women" 39(51/52) *Morbidity & Mortality Wkly Rep.* 929 (Jan. 4, 1991); Freya Sonenstein *et al.*, "Sexual Activity, Condom Use and AIDS Awareness Among Adolescent Males," 21(4) *Fam. Plng Persp.* 152 (1989); *Surgeon General's Call to Action*, *supra* n. 19, 4 (noting high level of adolescent pregnancy).

[22] In *Sable Communications*, 452 U.S. at 126, and *Reno v. ACLU*, 521 U.S. at 863 n. 30, this Court assumed that government has a strong interest in shielding minors "from the influence of literature that is not obscene by adult standards," but it did not rely on evidence or explain the nature of the influence. Certainly, the Court did not say that government has a compelling interest in suppressing messages it deems to be sexually immoral or reflective of an "abnormal" sexual perspective.

therefore, speakers cannot tailor their expression to the standards of the community likely to receive it. COPA's reliance on "contemporary community standards" is thus not only overbroad, as the court of appeals ruled, but vague as well.

Second, there is no clear dividing line in contemporary culture between the "pornography" that the government insists is COPA's main target, and other sexually oriented art, literature, or information that a local community might find prurient, patently offensive, and lacking in serious value for minors. Indeed, "pornography" itself is a word whose meaning varies depending on the viewpoint of the person using it. COPA, which employs even more open-ended terms, will mean very different things to decisionmakers in different communities, some of which might well find Susie Bright's "Sexpert" column from Salon. com, information about sex toys and masturbation from the Sexual Health Network, or advice from Dr. Ruthless to be "harmful to minors." See also the many examples in the Brief of *Amici Curiae* American Society of Journalists and Authors *et al.*, 12-18.

Sexuality is so pervasive in contemporary culture that any dividing line between "harmful to minors" material and non-"offensive" or non-"prurient" sexual expression is amorphous and shifting. It is questionable, for example, whether the girlie magazines at issue in *Ginsberg* would qualify as "harmful to minors" today. Certainly, it is unclear whether *Playboy* magazine, taken as a whole, is without value for older minors, as the government seems to assume. (*Playboy* contains many non-prurient articles on political and cultural subjects in addition to its images of buxom women.) The distinction between material arousing minors' "prurient," i.e., "shameful or morbid" interests and material arousing only "normal sexual responses," see *Brockett v. Spokane Arcades*, 472 U.S. 491, 498-99 (1985), adds further difficulty for Web speakers in determining what COPA prohibits.

Third, COPA's vagueness is exacerbated by the wide range of ages and maturity levels covered by the law. What is patently offensive, appeals to a shameful or morbid interest in sex, or lacks serious value for a 6 year-old differs substantially from what is offensive, prurient, or lacking in value for a 10, 12, 14, or 16½ year-old. Laws "aimed at protecting children from allegedly harmful expression -- no less than legislation enacted with respect to adults -- must be clearly drawn," with standards "reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Circuit v. Dallas*, 390 U.S. 676, 688-89 (1968).

Recognizing this problem of age range, courts in previous cases have narrowed state harmful-to-minors laws to suppress only material considered patently offensive, prurient, and without serious value for "a legitimate minority of normal, older adolescents." *Commonwealth v. American Booksellers' Ass'n*, 236 Va. 168, 177, 372 S.E.2d 618, 624 (1988); see also *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *American Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). The government takes the same tack in the present case. See Pet. Br., 27, 30. But there is no basis for this drastic rewriting of the law, which, while conceivably saving it from unconstitutional vagueness and overbreadth, would do so by robbing it of effectiveness in advancing Congress's supposedly compelling interest in shielding younger minors from exposure to "abnormal" sexual perspectives. Indeed, the government's interpretation makes COPA indistinguishable from an adult obscenity law, since it is impossible for Web publishers to discern the difference between serious value for a 16½ year-

old and a 17 year-old.[23]

These problems of vagueness are particularly troublesome in a law that imposes criminal penalties. As several justices have recognized, "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith v. United States*, 431 U.S. 291, 313 (1977) (Stevens, J, dissenting); see also *McKinney v. Alabama*, 424 U.S. 669, 679 (1976). The problem is magnified by COPA's varying range of ages and community standards.

Finally, of course, vagueness is a matter of greater concern when a law "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). As the record in this case amply shows, COPA threatens the First Amendment rights of countless Web publishers and readers, both young and old.[24]

CONCLUSION

Absent empirical proof of harm, the government's desire to convey a message of moral disapproval is not sufficient to justify COPA. It also distracts from truly effective ways to

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[23] Adult obscenity laws of course remain available for the purpose of shielding minors from hardcore pornography.

[24] *Ginsberg* rejected a vagueness challenge to New York's "harmful to minors" law without addressing the heightened First Amendment scrutiny that should apply, or the range of ages for which judges and juries would have to make decisions about offensiveness, value, and prurience. Nor did *Ginsberg* deal with an indeterminate geographical community, or a culture in which explicit sexual material is pervasive.

educate young people about good sexual values and behavior. Particularly given the pervasiveness of sexual ideas and images throughout contemporary culture, and the facility of minors in navigating the Internet, education is likely to be a more effective approach. The court of appeals' judgment should therefore be affirmed.

Respectfully submitted,

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Sept. 20, 2001

APPENDIX: DESCRIPTION OF *AMICI*

The Society for the Scientific Study of Sexuality (SSSS), founded in 1957, is an international organization of professional sexual scientists dedicated to the advancement of sexual knowledge. The Society publishes *The Journal of Sex Research*, the *Annual Review of Sex Research* and *Sexual Science*, the Society newsletter. The Society sponsors programs to award research excellence and holds an annual meeting and regional conferences to promote interdisciplinary cooperation among researchers, educators, and clinicians.

The Institute for Advanced Study of Human Sexuality, located in San Francisco, is the only fully approved graduate school of sexology in the world. It is trustee of the world's largest collection of erotological materials (more than 3 million books, journals, films, and other artifacts), and provides advanced training for sexuality counselors, therapists, scholars, and educators.

The Sexual Health Network (TSHN), founded in 1996, is an Internet-based, sexuality focused content provider. The Sexual Health Network is dedicated to providing easy access to sexuality information, education, mutual support, counseling, therapy, healthcare products, and other resources for people with disabilities, illness, or natural changes throughout the life cycle and those who love them or care for them.

The American Board of Sexology is a certifying body created by the leading sex educators, sex researchers, and sex therapists in the world, to provide credentialing to professionals in the field as a form of consumer protection. It has established minimum standards of education, time in practice, and a common body of knowledge in the field. The

board, through an additional organization, is a provider for the State of Florida of advanced training in clinical sexology for professional mental health counselors, social workers, and psychologists.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 51 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensible to a healthy democracy. NCAC educates the public and policymakers about threats to free expression and works to create a more hospitable environment for laws, decisions, and policies protective of free speech and democratic values. The positions advocated by the National Coalition Against Censorship in this brief do not necessarily reflect the positions of each of its participating organizations.

The First Amendment Project (FAP) is a nonprofit, public interest law firm and advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

No. 00-1293

Supreme Court, U.S.
FILED
SEP 20 2001
CLERK

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 00-1293

JOHN ASHCROFT, ATTORNEY GENERAL,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

Amici collectively represent a large number of companies who engage in or facilitate commerce on the Internet. *Amici*, both as individual entities and as associations, share the goal of protecting children from harmful material online and recognize the need to make available mechanisms that do so.

When the government regulates speech based on content, however, it must demonstrate that it has chosen the least restrictive available alternative. In the view of *amici*, the government cannot make that demonstration in this case. As this Court recognized when striking down the precursor to the statute at issue here, "'currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for

their children will soon be widely available.'" *Reno v. ACLU*, 521 U.S. 844, 877 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). Since that decision, the number and efficacy of the available user-based tools have increased dramatically. *Amici* have played an active role in developing and promoting these user-based tools, and submit this brief *amici curiae* to explain why the existence of these tools makes clear that the content-based restriction in the Child Online Protection Act ("COPA") is not the least restrictive means of protecting children from harmful material on the Internet.

INTEREST OF AMICI[1]

Amici are the Chamber of Commerce of the United States of America, the Internet Technology Association of America, and the Computer & Communications Industry Association.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector and in every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the American business community.

The Information Technology Association of America ("ITAA") provides global public policy, business networking,

[1]The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or their counsel contributed money or services to the preparation or submission of this brief.

and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

The Computer & Communications Industry Association ("CCIA") is an international, nonprofit association of computer and communications firms. Small, medium and large in size, CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, re-sellers, systems integrators, third-party vendors and other related business ventures. CCIA's mission is to further its members' business interests by promoting open, barrier-free competition in the offering of computer and communications products and services worldwide. CCIA's motto is "Open Markets, Open Systems, Open Networks, and Full, Fair and Open Competition."

Many members of the *amici* and a large number of other leading companies in the Internet industry have worked to develop and promote user-based methods, including various types of technology, for protecting children from harmful material on the Internet. *Amici* believe that their experience educating the public about and promoting the use of parental control techniques, including technological tools, provides a perspective that may aid the Court's assessment of the legal and factual issues raised by the question of whether COPA is the least restrictive alternative to protect children from harmful material online.

INTRODUCTION

The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world, and the World Wide Web is a publishing forum

consisting of millions of individual Web sites that may contain text, images, illustrations, video or animation. The development of the Internet and the Web represents a remarkable advance in the ability of average persons to speak and listen to each other from virtually every corner of the globe. "It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – indeed the world – has yet seen." *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (three-judge court) (Dalzell, J., concurring), *aff'd*, 521 U.S. 844 (1997). Unlike other media, the Internet provides "an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." Pet. App. 56a. In cyberspace, "anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined." *Id.* at 41a. In short, the range of information available on the Internet is "as diverse as human thought." *Id.* at 56a.

Another defining characteristic of this new medium is its ability to empower individual users to control their own access to information. To a greater extent than with any other medium, technology enables individuals to determine how much – or how little – of this "never-ending worldwide conversation" to allow into their homes. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 883 (Dalzell, J., concurring).

The free flow of information that the Internet facilitates has spurred efforts toward political democratization and fostered commercial economic growth. Though the Internet is available only to a minority of the world's population today, Internet use is expected to rise rapidly during the next ten years, especially

in developing countries.[2] These positive developments have occurred precisely because the Internet allows users to choose the information they wish to obtain from the vast array of material available to them. As this ability to freely access information spreads across the globe, however, governments around the world are seeking to control the content that their citizens may access. A variety of countries have taken measures to censor or prevent their citizens from accessing material posted on the Internet. *See* Reporters Sans Frontiers, *Enemies of the Internet: Attempts to Block the Circulation of Information on the Internet: Report 2001* (2001). Some western countries have attempted to block racist, xenophobic and sexually explicit Internet content,[3] while authoritarian

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[2] *See* The World Bank Group, *Developing Countries Could See Fastest Growth in Over a Decade But Are Hurt by Trade Barriers in Rich Nations* (Dec. 5, 2000), http://wbln0018.worldbank.org.news/pressrelease.nsf?OpenDatabase&Start=349.

[3] A French court, for example, has ruled that Yahoo!, Inc., – a U.S. company based in California – violated French law by allowing Nazi memorabilia to be auctioned on its Web site. The court ordered Yahoo! to block French users from accessing any Nazi material on its site or face daily fines. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1171-72 (N.D. Cal. 2001) (describing litigation). Similarly, in December 2000, the German Federal Court of Justice ruled that Germany's legislation banning the glorification of the Nazis and the denial of the Holocaust applies to people who post content on the Web from outside the country, as long as the content is accessible to German Internet users. The decision upheld the conviction of an Australian Holocaust revisionist for insulting the memory of the dead by posting on an Australian Web site his belief that the Holocaust never occurred. *See* Ian DeFreitas, *Worldwide Web of Laws Threatens the Internet*, Times of London, Jan. 9, 2001 (2001 WL 4865394). And in January 2001, an Italian court held that Italy can enforce its libel laws against anyone who posts content on the Internet, even if the speakers are based in other countries. The ruling stemmed from a claim filed by an Israeli man living in Italy against a foreign Web site for slandering him in a report about a custody dispute. *See No*

regimes have resorted to even more extreme measures to limit their citizens' access to material online.

Censorship efforts such as these threaten the Internet's viability and vitality. At the same time, there is a growing recognition around the world – from the European Union to Singapore – that the most effective way to protect Internet users from undesired content is through the use of user-based tools that empower users to control the Internet content they receive.[4]

In the *Reno v. ACLU* decision in 1997, this Court rejected censorship of Internet speech, and by so doing set a clear example to the world as to the appropriately high level of legal protection afforded to speech on the Internet. That decision fostered the continued development and refinement of user-based tools to protect children and others online. In this case, the Court should reaffirm the principles of its original *Reno v. ACLU* decision, and should again set an example for the world. As this Court has recognized, if the Internet is truly to serve as a "'unique and wholly new medium of worldwide human communication'" that can make information available "'not just in Philadelphia, but also in Provo and Prague,'" *Reno v. ACLU*, 521 U.S. at 850, 854 (quoting *ACLU v. Reno*, 929 F. Supp. at 844), efforts to regulate or censor the Internet must be approached with extreme caution and adopted only if absolutely necessary. *Id.* at 849, 851, 854.

National Boundaries for Libel on the Internet, Italy. Cass., closed session, Nov. 17-Dec. 27, 2000, Judgment No. 4741, available at www.cdt.org/speech/international/001227italiandecision.pdf.

[4] *See* ICRAsafe Project, http://europa.eu.int/ISPO/iap/projects/icrasafe.html (describing European support for user empowerment tools); http://www.pagi.org.sg/about.htm (describing industry led user-empowerment efforts in Singapore).

This is not to suggest that it is always inappropriate or unconstitutional for the United States government to act with respect to speech on the Internet. *Amici* do contend, however, that where, as here, a statute directly regulates lawful content on the Internet, that statute must be carefully scrutinized to determine whether alternatives exist that would be equally effective in protecting children from harmful material without the need for governmental censorship. As *amici* explain below, in our view such alternatives exist. Accordingly, *amici* urge the Court to conclude, as did the District Court and the Third Circuit, that COPA unnecessarily burdens speech on the Internet.

BACKGROUND

As participants in the growth and development of the Internet, *amici* recognize that parents have a genuine and legitimate need for assurance that their children will be protected from encountering online material that their families deem inappropriate for them. In response to this important need, many of the leading companies in the Internet industry have developed and promoted user-based technology tools that empower parents to control the material their children view on the Internet.

The volume and variety of tools developed by the private sector to empower Internet users has increased dramatically since the courts first considered such technology as an alternative to mandatory content restrictions. Whereas the district court noted in the 1996 CDA challenge that filtering software had been on the market for "over a year," citing about a dozen available choices, *ACLU v. Reno*, 929 F. Supp. at 839-42, testimony in this case two years later identified about 50

available types of blocking and filtering software and services. *See* Tr. 185.[5] Since then, the number of available technology tools has continued to grow. Today, the number of "tools for families" listed in one online resource stands at 146.[6]

The Internet industry and non-profit community have made strenuous and concerted efforts to raise public awareness of these user-end tools and to ensure that they are widely available to families at relatively low cost. For example, "GetNetWise," an industry-wide children's online safety project, works to ensure that parents have a user-friendly and easily accessible resource that provides information on, and access to, filtering and blocking software. Launched in 1999, GetNetWise includes: (1) educational information about childrens' online safety, (2) information about recognizing and reporting online crimes against children, (3) a searchable database featuring the wide range of technology tools families may use to help protect children online, and (4) collections of Web sites for kids.[7] The goal of GetNetWise is to ensure that parents can easily find information about self-help methods for protecting their children on the Internet. It is now estimated that over 90 percent of Internet users pass through a site from which the user can access GetNetWise with one click of the mouse.[8]

This wide variety of tools differs in terms of how each works, the types of materials each screens, and how

[5]"Tr." refers to Larry Magid's testimony at the January 20, 1999 preliminary injunction hearing.

[6]*See* http://www.getnetwise.org.

[7]*See id.*

[8]*See* http://www.getnetwise.org/pr12-19-00.shtml.

restrictively each does so. Their versatility helps ensure that individual households can tailor their preferences for accessing online materials based on the editorial/filtering policies of the product that most closely approximates their values. Moreover, the vast majority of Internet service providers offer access to these blocking and filtering software to their subscribers – often for free. Thus, parents have easy and inexpensive access to tools that allow them to protect their children from material that the parents deem harmful. These tools include:

Filtering and blocking software. This technology enables parents to install software on the family computer that blocks access to sites deemed by the parents to be inappropriate for their children. *See* Tr. 164. Parents can choose from a wide variety of filtering approaches to find a system that suits their family needs. *See id.* at 164-65.[9] For example, some filtering companies ask experts, parents and teachers to rate and classify sites, while others identify inappropriate content by searching for key words. A third group of filtering software combines these two approaches. The filtering software products on the market today can be customized to suit the individual preferences of each family. For example, parents have the ability to adjust settings according to the age of their children, the time of day their children most often use the Internet, and the number of family members that share the same terminal. Families can also enforce their own values – either more or less restrictively – by defining the particular types of content they

[9]A wide range of filtering and blocking software is available, including, for example, Internet Guard Dog, http://www.mcafee-at-home.com/products/internet-guard-dog/; Cyberpatrol (for Home) by Surfcontrol, http://www.surfcontrol.com/products/cyberpatrol_for_home/product_overview/index.html; Cybersitter, http://www.cybersitter.com; SOS KidProof, http://www.soskidproof.com;andNetNanny, http://www.netnanny.com/home/home.asp.

wish to screen from their children (*e.g.*, violent material, hate speech, sexually explicit images).

Filtered Internet Service Providers ("ISP"). Parents who prefer not to install software on their computers can select an "ISP" that pre-screens content before it reaches the home computer. Some parents choose this option out of concern that their children are so computer-savvy that they will be able to thwart a program installed on the home computer. The Mayberry USA ISP, for example, provides nationwide filtered Internet service that blocks sites deemed pornographic even if specifically requested by a user. America Online ("AOL") offers a similar option to users of its service. When a parent creates a "Screen Name" for a child, the parent is prompted to set age-appropriate "Parental Controls," which (at no additional charge) may include restrictions on use of e-mail and chat functions.[10] *See* Tr. at 153-62. In addition, many ISPs provide users with discounted access to filtering and blocking software.

Filtered Internet Browsers and Search Engines. Widely used Internet browsers and search engines today provide customers with the option of screening out undesired content. When a search result produces a site identified as inappropriate, the site will be blocked or suppressed. Many filtered search engines and browsers are available free of charge, and can often be found as companions to popular search engines. For example, Kids CyberHighway functions as an attachment to the Microsoft Internet Explorer. The AltaVista search engine offers an advertising-revenue supported "Search Service," and

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[10]*See* http://www.aol.com/info/parentcontrol.html. Filtered ISPs include, for example, Integrity Online, http://www.integrity.com; Mayberry USA ISP, http://www.mbusa.net; FamilyClick, http://www.familyclick.com/welcome.cfm.

AOL provides a search engine, "NetFind Kids Only," that links only to sites considered safe for children.[11]

Self-Contained Online Communities. To ensure that their children access only a limited number of pre-approved sites, parents can employ products that use editorial guidelines to limit children's Internet exposure to educational and enriching Web sites. These tools create a closed universe of Web sites.[12]

Supervisory and Monitoring Tools. Technology is available today that enables parents to monitor their children's use of the Internet, as well as to restrict their use by time of day, or when a parent is present.[13] Some of these tools can be configured to operate with or without the child's knowledge, and with or without warning messages or system shutdowns for violations of pre-set rules for Internet use. Additionally, some may apply to Web sites, e-mail, chat, newsgroups, or other

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[11]Many browsers and search engines enable parents to filter undesired content, including, for example, Yahooligans!, http://www.yahooligans.com/parents/; Google's Safesearch, http://www.google.com/preferences; Lycos' Parental Control, http://searchguard.lycos.com; Ask Jeeves' Ask Jeeves Kids, http://www.ajkids.com; and AOL NetFind Kids Only, http://www.aol.com/netfind/kids/funsites.html. Some browsers are designed especially for children. For example, ChiBrow, available free from ChildrenBrowser.com, gives children easy access to more than 300 child-friendly sites, which are chosen based on guidelines posted on the site. Additional children's browsers are listed at http://www.yahooligans.com/parents/.

[12]*See, e.g.*, The Children's Internet, http://www.twodog.com; eKids Internet, http://www.ekidsinternet.com.

[13]*See, e.g.*, Spectator, http://www.spectorsoft.com; Computer Cop, http://www.computercop.com.

Internet fora. The two major Internet browsers, Internet Explorer and Netscape Navigator, have "caches" that list sites recently visited, while other products add another key feature – a "lock" to prevent erasure of the list of visited sites. *See* Tr. at 169-71.

Child-Oriented Internet Sites or "Greenspaces." Parents who prefer to guide their children to child-oriented sites without actually imposing technological barriers to other sites can choose from child-appropriate sites compiled by libraries and educators, such as "Kids Connect Favorite Web Sites" selected by school librarians for K-12 students, or the American Library Association's "700+" list of more than seven hundred child-friendly Web sites.[14]

As explained below, *amici* believe that the existence of these tools – and the government's ability to promote and foster their availability and use – presents a superior alternative to content regulation. These tools are the most effective way to protect children online, and they do so without imposing the crippling burdens on protected speech associated with COPA.

SUMMARY OF ARGUMENT

It is well settled that the government has a compelling interest in protecting children from harmful material – an interest *amici* share. *See, e.g., Reno v. ACLU*, 521 U.S. at 875. But "the mere fact that a statutory regulation of speech was

[14]Kids Connect Favorite Web Sites, http://www.ala.org/ICONN/kcfavorites.html; ALA list of "770+Great Sites," http://www.ala.org/parentspage/greatsites/. Similar sites include NetMom's Hot 100 Internet Sites for Kids, http://www.netmom.com/ikyp/samples/hotlist.html; and Cyberangel's CyberMoms Approved Links, http://www.cyberangels.org/cast/.

enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id.* Here, a key issue is whether the government has chosen the *least restrictive means* to achieve its objective of protecting children from "harmful to minors" material online.

In the view of *amici*, the government cannot show that it has met this burden. First, the government cannot demonstrate that COPA's content-based restriction is the most effective way to protect children from harmful material online. By its own terms, COPA does not protect children from all such material; it will not, for example, prevent children from accessing a wide variety of material that parents may prefer to exclude – including sexually explicit material found on non-commercial U.S. Web sites or commercial Web sites located overseas, violent material, or material expressing hatred toward groups or individuals. By contrast, the user-based tools described above allow parents to restrict access to such content – and to tailor such restrictions to the parents' view of what is appropriate, taking into account the child's age and level of maturity.

COPA's limited effectiveness is even more troubling in light of its restrictiveness. By definition, the speech COPA addresses is constitutionally protected as to adults. Because COPA imposes criminal penalties, it will unquestionably chill speech – Web site operators afraid of prosecution will either remove material that they fear might be deemed harmful to minors by any community, or place such material behind screens that can be lifted only by a user with a credit card or adult verification number. Even if such material is placed behind such screens rather than removed from the Internet altogether, the burden on speech will be significant – there is no

question that access to speech will be deterred, as adults will hesitate to provide such personal information to a Web site or adult-check company online. In contrast, user-based tools allow adults free, anonymous access to material that is lawful for adults, while preventing such access by minors.[15]

ARGUMENT

I. COPA IS A CONTENT-BASED REGULATION OF SPEECH SUBJECT TO STRICT SCRUTINY.

As the government concedes, COPA is subject to strict scrutiny because it regulates speech based on its content. *See* Brief for the Petitioner ("Pet. Br.") at 23. For content-based restrictions of speech such as COPA, "the usual presumption of constitutionality afforded congressional enactments is reversed." *United States v. Playboy Entm't Group Inc.*, 529 U.S. 803, 817 (2000). In such cases, regulations are "presumptively *invalid*" and the "the Government bears the burden to rebut that presumption." *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (emphasis added)).[16]

[15] The District Court recognized this in concluding that the government is unlikely to be able to demonstrate that COPA survives strict scrutiny: "The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means." Pet. App. 94a.

[16] It is irrelevant that COPA does not impose a complete ban on speech. Content-based burdens on protected speech are subject to strict scrutiny in the same way that content-based bans are. *See Playboy Entm't Group*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning

In order to rebut the presumption of invalidity and survive strict scrutiny, the government must first demonstrate that COPA is designed to further a compelling state interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). But that alone is not sufficient – the government must also demonstrate that it has chosen the least restrictive means to achieve its objectives. *Id.* ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.").

In order to demonstrate that a regulation satisfies the least restrictive alternative test, the government must show that its chosen method of regulation is effective, and that alternatives that do not burden speech are not equally effective. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("[T]he restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). Thus, "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. at 816. If other effective alternatives are available, the government must show that its chosen alternative is the least burdensome of protected speech. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976). Thus, the government's interest in protecting children does not justify an "unnecessarily broad suppression of speech addressed to adults," and the free speech rights of adults may not be diminished to allow them access only to material acceptable for children. *Reno v. ACLU*, 521 U.S. at 875 (citations omitted). As this Court explained in *Reno v. ACLU*, the "burden on adult

speech is but a matter of degree.").

speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874.

II. COPA FAILS STRICT SCRUTINY BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S OBJECTIVES.

A. User-Based Tools Are More Effective Than COPA in Serving the Government's Purpose.

1. The purpose of COPA is to limit the access of minors to harmful material on the World Wide Web. *See* H.R. Rep. No. 105-775 at 5-6 (1998). There can be no serious dispute, however, that COPA cannot achieve that goal effectively. First, COPA applies only to Web sites originating in this country, and thus does not even purport to prevent children from viewing material that originates overseas. The Internet, however, is a global network that connects users to Web sites that originate from countries around the world. A Web site that originates in any other country is just as accessible to a user in the United States as a Web site originating in this country.

Although precise figures are unavailable, it has been estimated that approximately forty percent of the content on the Internet originates outside the United States. *See* Pet. App. 62a. Thus, even if COPA rendered every Web site containing adult material and originating in the United States unavailable to children, children would still have ready access to a plethora of material on Web sites originating in other countries. *See* COPA Commission, *Final Report of the COPA Commission*, Oct. 20, 2000, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction. Methods for protecting

children in the U.S. must take into account this global nature of the Internet.").[17] As Judge Stuart Dalzell noted, "[p]ornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the [law]." 929 F. Supp. at 882-83 (Dalzell, J., concurring).

Nor does COPA limit children's access to non-commercial Web sites containing adult material, or to non-Web Internet material, including thousands of newsgroups and chat communications, that contain material that might be deemed harmful to minors. *See* H.R. Rep. No. 105-775 at 12 ("H.R. 3783 does not apply to content distributed through other aspects of the Internet such as one-to-one messaging (e-mail), one-to-many messaging (list-serv), distributed message databases (USENET newsgroups); real time communications (Internet relay chat); real time remote utilization (telnet) or remote information retrieval other than the World Wide Web (ftp and gopher)."). These sources of information constitute a substantial portion of Internet content. As the District Court concluded, COPA's failure to limit children's access to these materials undermines COPA's effectiveness: "[T]his Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal." Pet. App. 93a; *see also Final Report of the COPA Commission,*

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[17] *See* http://www.copacommission.org/report/.

at 27 ("This approach is not effective at blocking access to chat, newsgroups, or instant messaging.").[18]

2. COPA's content controls are particularly unnecessary given that Congress has already taken steps to promote less restrictive alternatives. In a section of COPA not challenged in this litigation, Congress required Internet Service Providers to inform their new customers "that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." *See* 47 U.S.C. § 230(d). By mandating this notification, Congress ensured that parents who are new to the Internet will be informed of the options available to them to protect their children online.

As explained above, *supra* at 8, well over 100 "tools for families" exist that allow parents to control the material to which their children have access. These user-based solutions allow parents to protect children from harmful material on Web sites originating overseas, on non-commercial Web sites, and in non-Web Internet formats, such as electronic mail, newsgroups or chat rooms. *See* Pet. App. 82a ("Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP.") (citing testimony of government expert Dan Olsen); *see also Final Report of the COPA Commission*, at 21 (observing that client-side filtering "can be

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[18]The fact that COPA does not materially advance the government's stated purpose alone renders it constitutionally suspect. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188-93 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983).

effective in directly blocking access to global harmful to minors content on the Web, in newsgroups, in email and in chat rooms"). Moreover, these tools are nuanced, allowing parents to decide what type of material is harmful based on the age of their children and their own family's values. These tools range from filtered ISPs and search engines that do not allow access to certain designated sites, to filtering and blocking software that screens based on parameters set by parents, to tools providing guidance on sites compiled by libraries and educators that have been deemed appropriate for various age groups. These tools may be used alone, or may be used in conjunction with one another to ensure that children have access only to that information their parents deem appropriate.

By requiring that parents be notified of the existence of these tools, Congress has already implemented an alternative that is more effective at accomplishing Congress' stated goal than is the restriction at issue here. This Court has routinely struck down content regulation in closely analogous circumstances, concluding that the existence of such "market-based solutions" and "technological approach[es] to controlling minor's access to [sexually oriented] messages" demonstrates that the content regulation adopted by the government is not the least restrictive alternative. *See, e.g., Playboy Entm't Group*, 529 U.S. at 814-15, 821; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 758-59 (1996); *Sable Communications*, 492 U.S. at 130-31.[19]

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[19]COPA cannot be defended on the ground that parents may not implement these tools even if they are aware of their existence. As this Court has indicated, a voluntary measure cannot be assumed to be ineffective because it "requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."

3. A special Commission established by Congress in COPA ("the COPA Commission") reached essentially the same conclusions with respect to COPA's effectiveness. The COPA Commission was established to study "methods to help reduce access by minors to material that is harmful to minors on the Internet." *See* 47 U.S.C. § 231, note.[20] The Commission, which was comprised of eighteen commissioners from government, industry and advocacy groups, representing a wide variety of political affiliations, evaluated and rated protective technologies based upon various factors including their effectiveness and implications for First Amendment values.

The Commission's conclusions are of particular significance here. First, the Commission found that user-side filtering and blocking technologies are more effective (and less restrictive of First Amendment values) than age verification systems based on credit cards and age verification systems based on independently issued identification passwords – the methods identified in COPA as affirmative defenses to prosecution. *See Final Report of the COPA Commission*, at 8, 21, 25, 27. The report applauded the use of "voluntary methods

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Playboy Entm't Group, 529 U.S. at 824; *see also Denver Area*, 518 U.S. at 758-59.

[20]In essence, the Commission's study, which was undertaken after Congress passed COPA, served as a substitute for congressional findings. Congress passed COPA without creating the detailed factual record constitutionally required to support its claim that COPA is the most narrowly tailored means to achieve its intended ends, and without adequately considering less restrictive approaches. The Senate held no hearings on COPA, and the House Commerce Committee conducted only a single hearing, mere weeks before the passage of COPA, as part of an Omnibus appropriations bill. The COPA Commission's report therefore is arguably the most thorough and searching analysis of the issues related to COPA undertaken at the behest of Congress.

and technologies to protect children," noting that, "coupled with information to make these methods understandable and useful, these voluntary approaches provide powerful technologies for families." *Id.* at 39.

Second, the Commission endorsed "consumer empowerment" as an essential aspect of protecting children in a global, decentralized network like the Internet. *Id.* at 39. While acknowledging that "no single technology or method will effectively protect children from harmful material online," the Commission made clear that the effort to protect children cannot depend upon new laws that contract the scope of available speech. *Id.* at 9. Among the approaches considered by the Commission were the many legislative options, including COPA, which have been proposed to control Internet content. The Commission concluded that the protections afforded by COPA would be fundamentally underinclusive, given COPA's inability to reach inappropriate material originating from abroad. *Id.* at 11, 13, 25, 39.

In short, the COPA Commission largely concurred with the views of *amici*. The effectiveness of COPA itself is severely limited. In contrast, user-based tools, coupled with other actions such as a campaign to educate parents and rigorous enforcement of existing laws, are the most effective way to protect children from online material that may be harmful.

B. User-Based Tools Are Less Restrictive Than COPA of Constitutionally Protected Speech.

1. Given the existence of other regulatory options that are at least as effective as COPA – and, indeed, are more effective – the government cannot meet its burden of demonstrating that it chose the least restrictive alternative if those options burden

speech to a lesser degree than does COPA. There is no question that that is the case. "In order to deny minors access to potentially harmful speech," COPA, like the Communications Decency Act, "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874.

a. First, by threatening speakers on the Internet with criminal sanctions, including up to $50,000 a day for each violation, COPA will have a direct impact on the content of lawful speech on the Web. To guard against potential liability under COPA, speakers who wish to communicate material that is entirely lawful as to adults will almost certainly eliminate content on their Web sites that could be deemed harmful to minors. Alternatively, Web site operators may place such speech behind costly screening devices. *See, e.g.*, Pet. App. 79a-80a; *see also Final Report of the COPA Commission*, at 25-26 (concluding that age verification system based on credit cards "imposes high costs on publishers" and that "[a]dverse impacts on First Amendment values result from cost to publishers"). In either case, "Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites." Pet. App. 89a. Such economic disincentives plainly burden protected speech. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating statute where speaker was "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either

restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable").

The government attempts to discount the burden COPA imposes on speakers, asserting that content providers will not feel the need either to remove speech or to place it behind adult verification screens based on what might be deemed harmful to minors in the most restrictive community in the nation. In making this assertion, the government argues that technology exists that allows Web sites to determine the geographical location of the user. *See* Pet. Br. at 33-34.

As an initial matter, the government's assertions regarding the state of technology are flatly contradicted by the record in this case. Both the District Court and the Third Circuit concluded that Web businesses cannot screen users based on their geographic location. *See* Pet. App. 62a; *see also* Pet. App. 24a, 35a (observing that "Web publishers are currently without the ability to control the geographic scope of the recipients of their communications"). Those findings are consistent with this Court's decision in *Reno v. ACLU*, in which this Court concluded that "'[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community.'" 521 U.S. at 853 (quoting district court).

This observation remains true today. Despite continuing advances in Internet technology, effective geographic filtering based on the state in which a Web user is located is not currently technologically feasible. Although the government cites an extra-record law journal article to support its point, *see* Pet. Br. at 34 n.3, even that article does not support the conclusion that Web publishers can effectively screen users using geographic identification technology. Indeed, the article

concludes that no companies currently provide geographical personal identification numbers via credit cards, that geographic identification technology is currently being developed but that it is "significantly more expensive" than age identification technology and "less accurate," and that it "can presently be defeated by Internet anonymizers, remote sessions via Telnet, and remote dial-up connections." *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 810-11 (2001). Although the article is optimistic about the development of geographic identification technology in the future, it concedes that "this technology is in flux, and nothing in our analysis turns on the precise accuracy of this information." *Id.* at 810 n.107.[21]

The government also hypothesizes that a Web business could require people seeking access to a Web site to provide their names and addresses in order to receive passwords, and that the business could "then mail passwords to the addresses provided at registration, limiting such mailing to the geographic areas of its choice." Pet. Br. at 34 n.3. In this way, the government suggests, a Web site could tailor its content to the various community standards of its users. In the view of *amici*, however, any such system would be unworkable. At most, a company could obtain the bricks-and-mortar *mailing address*

[21]The government also cites a French case involving Yahoo!, Inc. suggesting that the company is capable of blocking access from France to its auction sites. *See* Pet. Br. at 34 n.3. This reference is inaccurate. The record in the French case reveals substantial disagreement among the panel of experts regarding the state of technology and even the French court recognized that Yahoo! would have to ask users where they were located in order to determine geographical location. Yahoo! itself has consistently maintained that it is unable to screen geographically, and has sought declaratory relief from the French Court's judgment.

of a potential Web site user. That, however, would not identify the geographic location from which the user was accessing the Web. Thus, for example, a potential Web site user might provide a mailing address in New York and receive an "adult" password based on that address, but use the password at a computer terminal in Utah. Under the government's hypothetical system, a Web site operator would apply New York's community standard when that user accessed the site, even though the user was accessing the site in Utah, in violation of Utah's community standards. And, of course, in addition to being unworkable, such a system would impose enormous costs on Web sites forced to alter content, state-by-state, based on geographical locations associated with individual adult identification numbers.

This is not to say that technology will never be developed to allow Web sites to identify, at least roughly, the geographic location of some Web users. But such technology will certainly not be costless or comprehensive. The companies that are currently developing such technology will not likely provide it free of charge, and the expense associated with purchasing and implementing such technology may well be quite substantial (entirely apart from the potentially enormous expense of reviewing online content to comply with the standards of hundreds or thousands of local communities). Because of the nature of the Internet, any such technology will not likely be highly accurate or universal. Moreover, users will be able to circumvent location technology; indeed, already today commercial products are offered that, among other things, allow users to defeat location tracking. *See, e.g.*, http://www.freedom.net/info/index.html. For all of these reasons, even if location tracking technology were to become widely available, content providers would be unlikely to rely on it in the face of onerous criminal sanctions, and would instead

continue to place behind a screen all material that the most restrictive community might deem harmful to minors. *Amici* believe that a requirement to use such location technology would be burdensome, and would effectively chill the speech of many online publishers.

b. In addition to burdening the free speech rights of speakers on the Internet, COPA also burdens the protected First Amendment rights of adult Internet *users*. There is no question that, pursuant to COPA, speech that is protected as to adults will nonetheless be placed behind screens. Web users will be deterred from accessing Web sites if Web site operators are required to employ COPA's credit card or adult identification access code affirmative defenses (whether or not the Web site operator can determine the community in which the user is located). *See* Pet. App. 89a-90a As the record in this case amply demonstrates, users are often unwilling to provide identifying information such as a credit card number or a personal identification number to gain access to Web sites. *See id.* at 70a; *see also Reno v. ACLU*, 521 U.S. at 857 n.23.

In fact, as recent studies indicate, although Americans are concerned about children's access to pornography online, they are even more deeply concerned about online privacy: "[W]hen asked to describe the top three things that concern them about the Internet, nearly two thirds of all respondents (65 percent) mention something about the privacy of personal information. Another 29 percent cite pornography and the potential for children to access adult material on-line." Markle Foundation, *Toward a Framework for Internet Accountability*, at 15 (2001); *see also* Federal Trade Commission, *Privacy Online: A Report to Congress*, at 3 (1998) ("Clearly, consumers care deeply about the privacy and security of their personal

information in the online environment and are looking for greater protections.").

Although the government asserts that COPA imposes no greater burden on adult speech than laws requiring pornographic magazines to be placed behind "blinder racks" in stores, *see* Pet. Br. at 17-18, 29-31, that is plainly not the case. An adult who seeks to read a magazine that has been placed behind a blinder rack can reach behind the blinder and retrieve the magazine without revealing any identifying information. If the adult chooses to purchase the magazine with cash, no record whatsoever is maintained of the transaction. By contrast, because COPA requires an Internet user to provide personally identifying information online before material can even be accessed, in each and every instance a record containing personally identifying information will be created and maintained. Users will almost certainly be inhibited from accessing a Web site out of concerns that their identity and the fact that a particular site was accessed will be recorded. *See, e.g., Privacy Online: A Report to Congress*, at 3 (noting that "a substantial number of online consumers would rather forego information or products available through the Web than provide a Web site personal information without knowing what the site's information practices are") (footnote omitted); *accord Final Report of the COPA Commission*, at 25-27 (noting that a Web site that conditions entry on users' provision of credit card numbers or adult identification passwords "poses privacy risks"). Here, those concerns will be particularly acute, because the relevant Web sites may contain sensitive or potentially embarrassing content.

The First Amendment protects against inhibiting speech in this fashion. *See Denver Area*, 518 U.S. at 754-55. As this Court has explained, "[a]nonymity is a shield from the tyranny

of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citation omitted). The fact that the speech may be sexual in nature, and even offensive to some sensibilities, cannot justify suppressing it. *See Reno v. ACLU*, 521 U.S. at 874-75; *Playboy Entm't Group*, 529 U.S. at 814.

2. Voluntary adoption of user-based technologies to protect children, by contrast, does not restrict adult access to constitutionally protected speech. First, parental controls on children's access to the Internet do not inhibit Web *speakers* from providing Web content that is lawful as to adults. Speakers neither risk criminal liability nor experience economic disincentives for engaging in protected speech. Nor do parental controls inhibit Web *users* from accessing protected content. Adults wishing to access constitutionally protected material are not dissuaded from doing so by the privacy concerns implicated by the use of credit cards or adult verification passwords. Instead, user-based technologies enable parents to screen information without revealing personal information to Web sites. Adults continue to enjoy unfettered access to lawful information, while parents are able to protect their children from information they deem potentially harmful to their children.

The Congressional record does not suggest otherwise. Indeed, far from demonstrating that it chose COPA's content-based restriction because it believed it was the *least*-restrictive alternative, the legislative history demonstrates the opposite. The House Report indicates that Congress rejected reliance on user-based tools because "[n]o single company has complete

control over the access points to the Internet or is responsible for all the content." H.R. Rep. No. 105-775 at 17. The legislative history thus demonstrates that Congress augmented user empowerment tools with content controls not because such tools are ineffective, but because they allow *too much* individual choice over Internet content. Such a conclusion – like the argument that the Web must be regulated because it allows "*too much* speech" – is "profoundly repugnant to First Amendment principles." *ACLU v. Reno*, 929 F. Supp. at 881 (Dalzell, J., concurring). As this Court recently emphasized:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Playboy Entm't Group, 529 U.S. at 818.

3. Indeed, the COPA Commission itself agreed that user-based tools are less burdensome of protected speech than the kinds of content restrictions required by COPA. According to the Commission's report, age verification systems based on credit cards and adult identification passwords will have a significantly greater adverse effect on First Amendment values and privacy than user-based filtering and blocking technologies. *See Final Report of the COPA Commission*, at 8, 19-22, 25-27. Thus, even the body established by Congress to study methods to protect children from harmful material online concluded that

the methods identified in COPA as affirmative defenses are more restrictive of protected speech than user-based tools.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below.

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September 20, 2001

Supreme Court, U.S.
FILED
NOV 27 200
CLERK

No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Pursuant to Rules of the Supreme Court of the United States 25.5 and 33.3(g), plaintiffs-respondents in this case attach the following supplemental authorities, which are pertinent to the above-referenced case. This case is scheduled for oral argument before this court on November 28, 2001. The following cases were decided after plaintiffs-respondents filed their brief.

PsiNet v. Chapman, 167 F. Supp. 2d 878 (W.D. Va. 2001) (granting plaintiffs' motion for summary judgment against Virginia state statute that criminalized harmful-to-minors materials on the Internet) (attached as Exhibit A hereto).

ACLU v. Napolitano, No. CV-00-0505-TUC-AM (D. Ariz. Oct. 12, 2001) (granting plaintiffs' motion for temporary restraining order against Arizona state statute that criminalized harmful-to-minors materials on the Internet) (attached as Exhibit B hereto).

Plaintiffs-respondents provide these supplemental authorities because both the Virginia and Arizona state statutes are similar to the Child Online Protection Act (COPA) preliminarily enjoined in this case.

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EXHIBIT A

167 F. Supp. 2d 878 (W.D. Va. 2001)

United States District Court,
W.D. Virginia,
Charlottesville Division.
PSINET INC., et al., Plaintiffs,
v.
Warner D. CHAPMAN, et al., Defendants.
No. 3:99CV00111.
Oct. 11, 2001.

Businesses, associations, and individuals located in and outside of Virginia, using Internet to disseminate wide range of speech, sued state of Virginia, seeking permanent injunction barring enforcement of statute criminalizing sale, rental or loan to juveniles of sexually harmful material. After obtaining preliminary injunction, *108 F. Supp. 2d 611*, claimants moved for summary judgment. The District Court, Michael, Senior District Judge, held that: (1) statute was content-based restriction on expression subject to strict scrutiny; (2) Virginia's interest in protecting minors from sexually explicit materials was compelling; (3) statute violated First Amendment; and (4) statute violated the Commerce Clause.

Motion granted.

West Headnotes

[1] Constitutional Law 90.4(1)

92k90.4(1) Most Cited Cases

Virginia statute criminalizing sale, rental, or loan to juveniles of sexually harmful material was content-based

restriction on expression protected by the First Amendment, thus it was presumptively invalid and could only be upheld if it survived strict scrutiny. *U.S.C.A. Const. Amend. 1*; *Va. Code 1950, § 18.2-391.*

[2] Constitutional Law 90.4(1)

92k90.4(1) Most Cited Cases

[2] Infants 13

211k13 Most Cited Cases

While obscenity was not protected by the First Amendment, Virginia statute criminalizing sale, rental, or loan to juveniles of sexually harmful material also extended to indecent speech, which was protected by the First Amendment. *U.S.C.A. Const. Amend. 1*; *Va. Code 1950, § 18.2-391.*

[3] Constitutional Law 90(3)

92k90(3) Most Cited Cases

To satisfy strict scrutiny applicable to content-based regulation of speech, the law in question must be (1) narrowly tailored to (2) promote a compelling government interest. *U.S.C.A. Const. Amend. 1.*

[4] Constitutional Law 90(3)

92k90(3) Most Cited Cases

The government has the burden of showing that a content-based regulation of speech is necessary to serve a compelling state interest; this burden is not insignificant. *U.S.C.A. Const. Amend. 1.*

[5] Constitutional Law 90(3)

92k90(3) Most Cited Cases

Merely asserting that the government has an interest in preventing some harm cannot justify the suppression of free speech if insufficient evidence exists to suggest that such harm is likely to occur in the absence of regulation; that is, that the government's asserted interests are important in

the abstract does not mean that the regulation will in fact advance those interests. *U.S.C.A. Const. Amend. 1.*

[6] Constitutional Law 90(3)

92k90(3) Most Cited Cases

When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured to satisfy strict scrutiny applicable to content-based regulation of speech. *U.S.C.A. Const. Amend. 1.*

[7] Constitutional Law 90.4(1)

92k90.4(1) Most Cited Cases

[7] Infants 12(8)

211k12(8) Most Cited Cases

Virginia's asserted interest in protecting, and helping parents to protect, minors from sexually explicit materials was compelling, for purposes of analyzing constitutionality of Virginia statute regulating content-based speech by criminalizing sale, rental or loan to juveniles of sexually harmful material. *U.S.C.A. Const. Amend. 1*; *Va. Code 1950, § 18.2-391.*

[8] Constitutional Law 90(3)

92k90(3) Most Cited Cases

Even if the government has a compelling interest in restricting speech, that restriction must be narrowly tailored in order to survive strict scrutiny analysis under the First Amendment. *U.S.C.A. Const. Amend. 1.*

[9] Constitutional Law 82(3)

92k82(3) Most Cited Cases

A law is "narrowly tailored," for purposes of evaluating its constitutional validity under First Amendment, if it employs the least restrictive means to achieve its goal and if there is a nexus between the government's compelling interest and the restriction. *U.S.C.A. Const. Amend. 1.*

[10] Constitutional Law ⚿82(3)

92k82(3) Most Cited Cases

If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny analysis under the First Amendment. *U.S.C.A. Const. Amend. 1.*

[11] Constitutional Law ⚿90(3)

92k90(3) Most Cited Cases

The burden imposed by the government on speech must be outweighed by the benefits gained by the challenged statute, to satisfy strict scrutiny applicable to content-based regulation of speech. *U.S.C.A. Const. Amend. 1.*

[12] Constitutional Law ⚿90.4(3)

92k90.4(3) Most Cited Cases

[12] Infants ⚿12(8)

211k12(8) Most Cited Cases

Virginia statute criminalizing sale, rental, or loan to juveniles of "electronic file or message containing an image" or "electronic file or message containing words" depicting sexually harmful material was not narrowly tailored to promote government's compelling interest in protecting minors from such material, and thus violated First Amendment; statute provided no defense to Web sites which provided measures to exclude minors, adults would be substantially burdened from accessing protected material on Internet by having to contend with exclusionary measure that Web sites would use, statute burdened bulletin boards, newsgroups, and commercial Web sites that consisted mostly of material suitable for minors, and statute would not effectively stop content originating from other countries. *U.S.C.A. Const. Amend. 1; Va. Code 1950, § 18.2-391.*

[13] Constitutional Law ⚿90.1(9)

92k90.1(9) Most Cited Cases

The relevant inquiry to determine the burden imposed on protected speech regulated by a statute, for purposes of First Amendment analysis, is not the pressure placed on the pocketbooks or bottom lines of Web site operators and content providers; strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of speech from the marketplace of ideas. *U.S.C.A. Const. Amend. 1.*

[14] Commerce ⚿56

83k56 Most Cited Cases

The negative implication of the Commerce Clause includes a prohibition on state regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace. *U.S.C.A. Const. Art. 1, § 8, cl. 3.*

[15] Commerce ⚿82

83k82 Most Cited Cases

[15] Obscenity ⚿2.1

281k2.1 Most Cited Cases

State obscenity regulations are not invalidated under the Commerce Clause because they impose compliance costs on businesses located outside their state's borders. *U.S.C.A. Const. Art. 1, § 8, cl. 3.*

[16] Commerce ⚿82

83k82 Most Cited Cases

[16] Infants ⚿12(8)

211k12(8) Most Cited Cases

Virginia statute criminalizing sale, rental, or loan to juveniles of sexually harmful material violated the Commerce Clause; Virginia statute unduly burdened and discriminated against Web site operator which could not

limit access to online materials by geographic location due to current status of geographic filtering technology on Internet and would have to comply with most restrictive state obscenity regulation, if it were to make its content available on Web at all, in contrast to purveyors of real-space pornography who could choose to comply with regulations of only those states to which they affirmatively distributed. *U.S.C.A. Const. Art. 1, § 8, cl. 3*; *Va. Code 1950, § 18.2- 391.*

West Codenotes

Held Unconstitutional

Va. Code Ann. § 18.2-391

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MEMORANDUM OPINION

MICHAEL, Senior District Judge.

**1 The plaintiffs move for summary judgment in this action for an injunction against enforcement of *Va. Code Ann. Section 18.2-391* (Michie Supp. 1999) (amended 2000), which criminalizes the dissemination by computer of material that is harmful to minors. This court has already issued a preliminary injunction against enforcement of *section 18.2-391*, and in so doing concluded that the plaintiffs had demonstrated that they were likely to succeed on the merits of their claim that *section 18.2-391* violated the First Amendment and the Commerce Clause of the United States Constitution. The plaintiffs now ask this court to grant summary judgment and issue a final injunction against enforcement of *section 18.2-391*.

This action mirrors a number of other cases addressing both state and federal statutes that resemble *section 18.2-391*. Similar statutes in New York, New Mexico and Michigan prohibiting the use of the Internet to communicate material deemed "harmful to minors" have already been found unconstitutional. *See American Libraries v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997)*; *ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999)*; and *Cyberspace Communications v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999)*. In *Reno v. ACLU, 521 U.S. 844, 117 S.Ct. 2329, 138 L. Ed. 2d 874 (1997)* (hereinafter, "*Reno I*"), the Supreme Court held that a federal statute, the Communications Decency Act ("CDA"), which prohibited Internet users from using the Internet to communicate material deemed patently offensive to minors, violated the First Amendment. Most recently, the Child Online Protection Act, *Pub. L. No. 105-277*, 112 Stat. 2681 (1998) (codified at *47 U.S.C. § 231*) ("COPA"), which attempts to "address[ ] the specific concerns raised by the Supreme *881 Court" in invalidating the CDA, was nevertheless found unconstitutional by the Third Circuit in *ACLU v. Reno, 217 F.3d 162 (3d Cir. .2000)* (hereinafter "*Reno II*").

Section 18.2-391, like those state and federal statutes resembling it, was passed in response to what appears to be a legitimate concern regarding the proliferation of pornography on the Internet and the relative ease with which such material can be accessed by minors. However, despite precedent supporting the validity of similar statutes regulating sexually explicit media in physical spaces, courts have been reluctant to uphold statutes like the one before this court based on fundamental differences between cyberspace and physical space. While this court agrees that the direct application to the Internet of statutes drafted with only the physical world in mind is inappropriate, we do not feel that a statute's implication of the Internet alone should render it invalid, or that differences between law as

it applies in the physical world and law as it applies in cyberspace should be overstated. Technological advancements may, in the not-too-distant future, permit statutes similar to the one now before this court to regulate constitutionally content on the Internet. However, given the present state of Internet technology, it is patent that the bare application of the statute in question to the Internet would unconstitutionally interfere with the dissemination of protected speech to adults. That is, enforcement of *section 18.2-391* will unduly burden the access of adults to protected speech that is nevertheless putatively harmful to minors. In addition, technology does not currently allow content providers to control efficiently access to their material according to geographic criteria, and thus enforcement of *section 18.2-391* would impose a substantial burden on interstate commerce. Because *section 18.2-391*, as drafted, violates the First Amendment and the Commerce Clause, the court finds that summary judgment is appropriate in this case and grants the plaintiffs' motion.

I.

C. The Plaintiffs

**2 The plaintiffs represent a spectrum of businesses, membership organizations, and individuals--including Internet service providers, organizations representing booksellers, publishers, and other media interests, online businesses, individual authors and artists, and others--who use the Internet to communicate, disseminate, display, and seek access to a broad range of speech. The plaintiffs communicate online both within and from outside the Commonwealth of Virginia, and the plaintiffs' speech is accessible both within and outside of Virginia. All of the plaintiffs utilize the Internet to further their business and organizational goals. The plaintiffs fear that their online speech could be considered "harmful to juveniles" in some communities under the statute in question, *Va. Code Ann.*

Section 18.2-391 (Michie Supp. 1999) (amended 2000), even though that speech may receive full constitutional protection as to adults.

D. The Challenged Statute

For a number of years, the Commonwealth of Virginia has prohibited the knowing display in physical space of materials used for a commercial purpose that are harmful to juveniles. *See American Booksellers v. Commonwealth, 882 F.2d 125, 126 (4th Cir. 1989).* Codified as *Code of Virginia § 18.2-391* in 1970, this law was reenacted as amended in 1999, pursuant to 1999 Va. Acts ch. 936, to include not only material in physical space, but also electronic files or messages. The law was again reenacted in 2000, pursuant to the amendments adopted in 2000 Va. Acts ch. 1009. The plaintiffs' complaint challenges 1999 Va. Acts ch. 936 ("the Act"), codified *882 in *§ 18.2-391* ("the statute"), which adds phrases to expand the section's criminal prohibitions to cover "electronic file[s] or message[s]." The Virginia legislature passed the Act on April 7, 1999. The Act went into effect on July 1, 1999.

The statute, as amended, makes it unlawful to "sell, rent or loan to a juvenile" or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

1. Any picture, photography, drawing, sculpture, motion picture film, *electronic file or message containing an image*, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

2. Any book, pamphlet, magazine, printed matter however reproduced, *electronic file or message containing words*, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of

sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

Va. Code Ann. § 18.2-391 (Michie Supp. 1999) (amended 2000) (emphasis added). A violation of *§ 18.2-391* is a Class I misdemeanor, punishable by "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both." *Va. Code Ann. § 18.2-11(a)* (Michie 1950).

**3 The 2000 Amendment to *§ 18.2-391* adds to the statute the following paragraph:

> [I]f a person uses services of an Internet service provider or an electronic mail service provider in committing acts prohibited under this subsection, such Internet service provider or electronic mail service provider shall not be held responsible for violating this subsection.

Va. Code Ann. § 18.2-391 (effective July 1, 2000). This amendment was voted upon and passed by the Virginia legislature after the parties had been heard on the plaintiffs' motion for a preliminary injunction. The court then required supplemental briefs to be filed addressing the new amendment and its effect, if any, on the plaintiffs' complaint. The 2000 amendment creates a defense for ISPs and email service providers when a person violating the statute uses the services of an ISP or email service provider in the commission of the offense. This defense does not affect the merits of the plaintiffs' claim because the statute maintains a prohibition on the use of electronic files or messages to allow juveniles to examine or peruse material that is harmful to juveniles. Thus, an ISP or email service provider may still be liable under the statute when they are responsible for creating the allegedly harmful content.

The definitional provisions relevant to *§ 18.2-391* are contained in § 18.2- 390. The *Virginia Code Annotated, § 18.2-390(6)*, defines the term "harmful to juveniles" as:

> that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it
>
> (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles,
>
> (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and
>
> (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.
>
> *Va. Code Ann. § 18.2-390(6)* (Michie 1950).

Section 18.2-390 does not define the relevant "community" for purposes of determining *883 what is "harmful to juveniles" in the global medium of cyberspace. The statutory term "for commercial purpose" is likewise undefined. *See Va. Code Ann. § 18.2-11(a)* (Michie 1950). However, *Virginia Code § 18.2-390(7)* defines "knowingly" to mean:

> having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.
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> *Va. Code. Ann. § 18.2-390(7)* (Michie 1950).

II.

A motion for summary judgment should be granted only if there is no genuine dispute as to an issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 248, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). "[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc., 203 F.3d 274, 279 (4th Cir. 2000)* (quoting *McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356, 111 S.Ct. 807, 112 L. Ed. 2d 866 (1991)*). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson, 477 U.S. at 248, 106 S.Ct. 2505 (1986).* All facts and reasonable inferences that can be drawn therefrom must be interpreted in the light most favorable to the non-moving party. *See Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990).* However, the non-movant may not rest upon mere allegations and denials of the pleadings, and must assert more than a "mere scintilla" of evidence in support of her case in order to survive an adverse entry of summary judgment. *See Anderson, 477 U.S. at 248, 106 S.Ct. 2505.*

III.

**4 The Internet is a decentralized, global medium of communications that links people, institutions, corporations, and governments around the world. It is a giant computer "network of networks" which interconnects innumerable smaller groups of linked computer networks and individual computers offering a range of digital information including text, images, sound and video. While estimates are difficult due to its constant and rapid growth, host computers-- those storing the information and relaying communications on the Internet-- number in the tens of millions, and personal computers accessing the Internet have been estimated in the hundreds of millions. The court does not recite here the specifics of how the Internet functions; where necessary any relevant features of the Internet are described in the analysis of this case. This court described the general contours of the Internet in its memorandum opinion

addressing the plaintiffs' motion for a preliminary injunction, and various other judicial opinions provide thorough descriptions of the Internet as well. *See Reno I, 521 U.S. at 849-57, 117 S.Ct. 2329 (1997); Cyberspace, Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 740-44 (E.D. Mich. 1999); American Libraries Assoc. v. Pataki, 969 F. Supp. 160, 164-67 (S.D.N.Y. 1997); Shea v. Reno, 930 F. Supp. 916, 925-34 (S.D.N.Y. 1996).*

IV.

The plaintiffs claim that the Act violates the First Amendment. The plaintiffs argue, *884 and this court agrees, that, given the current state of Internet technology, enforcement of the Act will restrict the access of both adults and children to material considered "harmful to minors." That is, in its efforts to restrict the access of minors to indecent material on the Internet, the Act imposes, albeit unintentionally, an unconstitutional burden on protected adult speech. While the Act's unconstitutional nature is clear, a formal First Amendment analysis is nevertheless prudent given the likelihood of future legislative efforts to address the exposure of children to indecent material on the Internet and the rapid pace at which Internet technology advances.

[1][2][3] Because *section 18.2-391* is a content-based restriction on expression protected by the First Amendment *[FN1]*, it is presumptively invalid and can only be upheld if it survives strict scrutiny. *See United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878, 146 L. Ed. 2d 865 (2000)* (citing *Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L. Ed. 2d 93 (1989)*). The Supreme Court has emphasized that strict scrutiny applies to content-based regulation of Internet speech. *See Reno I, 521 U.S. at 870, 117 S.Ct. 2329.* To satisfy strict scrutiny, the law in question must be (1) narrowly tailored to (2) promote a compelling

government interest. *See Playboy, 529 U.S. at 813, 120 S.Ct. 1878.*

FN1. While obscenity is not protected by the First Amendment, the Act also extends to indecent speech, which is protected by the First Amendment.

[4][5][6] The government has the burden of showing that a content- based regulation of speech "is necessary to serve a compelling state interest." *See First Nat'l Bank v. Bellotti, 435 U.S. 765, 786, 788-89, 98 S.Ct. 1407, 55 L. Ed. 2d 707 (1978).* This burden is not insignificant. Merely asserting that the government has an interest in preventing some harm cannot justify the suppression of free speech if insufficient evidence exists to suggest that such harm is likely to occur in the absence of regulation. That is, "that the Government's asserted interests are important in the abstract does not mean, however, that the [regulation] will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms; it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L. Ed .2d 497 (1994)* (quoting *Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). See also* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech, 53 Vand. L. Rev. 427 (2000)* (discussing the necessity of rigorous "compelling interest" analysis).

**5 *[7]* In this case, the state's asserted interest in protecting, and helping parents to protect, minors from sexually explicit materials is compelling. The Supreme Court has recognized this interest in numerous cases. In *Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L. Ed. 2d 195 (1968)*, the Court upheld a New York statute prohibiting the sale to minors of material harmful to them, even if the distribution of those materials to adults is

protected. The Court identified two interests the state has in limiting the availability of sex materials to minors. First, the Court stated that "the legislature could properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *885*Ginsberg, 390 U.S. at 639, 88 S.Ct. 1274.* The Court noted that, while this support would assist parents who wish to limit their children's access to sex material, it would not bar a nonconformist parent from purchasing sex magazines for their children. *Id.* Second, the Court asserted that "the state also has an independent interest in the well- being of its youth." *Id.*

The two interests acknowledged by the Court in *Ginsberg* were echoed in its decision in *FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct. 3026, 57 L. Ed. 2d 1073 (1978).* In *Pacifica*, the Court upheld the constitutionality of an FCC finding that the broadcast of George Carlin's "Filthy Words" monologue was indecent and prohibited by statute. *Id.* In so holding, the Court determined that the broadcast of patently offensive words dealing with sex, although not obscene, may be regulated because of its content. These indecent words offend for the same reasons that obscenity offends, and are of slight social value. Furthermore, the Court found that the broadcast was uniquely accessible to children, implicating the government's interest in the "well-being of its youth" as expressed in *Ginsberg. Pacifica, 438 U.S. at 749, 98 S.Ct. 3026* (quoting *Ginsberg, 390 U.S. at 640, 88 S.Ct. 1274).*

Society's interest in shielding children from exposure to indecent material has been reaffirmed in a trilogy of recent cases addressing state statutes similar to the one at issue in this action. *ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999), Cyberspace Communications v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999),* and *American Libraries v. Pataki,*

969 F. Supp. 160 (S.D.N.Y. 1997), all considered the constitutionality of state statutes prohibiting the use of computers or the Internet to disseminate indecent materials to minors. In each case, the courts found an indisputably compelling interest in protecting the physical and psychological well-being of minors. Furthermore, in *Reno I*, in which the Supreme Court held that portions of the Communications Decency Act ("CDA"), *47 U.S.C. § 223(a)(1), (d)*, violated the First Amendment, the Court recognized that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards. *Reno I, 521 U.S. at 870, 117 S.Ct. 2329.*

**6 This court agrees that the state has a compelling interest in restricting minors' access to offensive material. The dearth of empirical evidence establishing a link between the exposure of minors to sexually explicit material and antisocial behavior does not alter this conclusion. By recognizing the compelling interest now asserted by the defendants, courts have implicitly acknowledged what Congress and many state governments have indicated by their decisions to pass legislation like that now before this court. Namely, the majority of those primarily responsible for the well-being of children feel exposure to non-educational, sexually explicit material can have a negative effect on a child's development. The state government has a compelling interest in helping those parents and teachers who wish to avoid the exposure of their children to this material. While some parents may feel concerns regarding indecent material are exaggerated, these parents can still access sexually explicit material on the Internet for their children even if safeguards like those contemplated by the defendants are in place. While this court recognizes that the Internet is a very different medium than the brick and mortar bookstore, the burden imposed on a parent seeking to procure indecent material for her child on the Internet is

arguably less substantial than that imposed on a parent desiring to purchase a sexually explicit magazine for her child at a bookstore. A parent accessing *886 indecent material on the Internet does not need even to leave her home.

Furthermore, concerns regarding government support for consensus child development standards are overstated. This court recognizes that parental views regarding what activities and materials are suitable for children are not always in harmony. Some parents believe minors should have relatively unrestricted access to firearms, while others do not. Many parents feel the current age restrictions on the consumption of alcoholic beverages are too restrictive and that controlled exposure to alcohol at a younger age may lead to more moderate and mature consumption practices in the future. Nevertheless, governments have imposed regulations in these areas and many others not only out of concern for the danger these activities pose to third parties, but also as state measures reinforcing widely held social values.

Perhaps most closely analogous to the exercise of government authority embodied in *section 18.2-391* is the state mandated minimum age for marriage in *Va. Code Ann. Section 20-48* (Michie Supp. 2000). Like the exposure of minors to indecent sex material, the marriage of children under sixteen years of age is unlikely to have an immediate and tangible negative impact on third parties. Nevertheless, states have implemented age restrictions on marriage, not only suggesting that individuals should have some minimum level of maturity to enter into marriage, but also reinforcing normative expectations regarding family stability. These expectations have also been voiced at the national level. For example, in passing the 1996 welfare reform legislation, Congress determined that "(1) Marriage is the foundation of a successful society; (2) Marriage is an

essential institution of a successful society which promotes the interests of children; and (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children." Personal Responsibility Act, *42 U.S.C. § 601.*

**7 In *American Booksellers, 882 F.2d 125 (4th Cir. 1989)*, the Fourth Circuit upheld the constitutionality of the underlying statute in question and in doing so found that the state had a compelling interest in regulating the distribution of speech in print format when that speech is considered harmful to minors. In this case, the state's interest in restricting harmful speech on the Internet is just as compelling as that upheld in *American Booksellers.* In fact, "many of the same characteristics which make cyberspace ideal for First Amendment expression--ease of participation and diversity of content and speakers" make it a potentially more harmful media for children than the print media. *ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).*

[8][9][10][11] However, even if the government has a compelling interest in restricting speech, that restriction must be narrowly tailored in order to survive strict scrutiny. A law is narrowly tailored if it employs the least restrictive means to achieve its goal and if there is a nexus between the government's compelling interest and the restriction. *See City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706, 102 L. Ed. 2d 854 (1989).* If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. *See Reno I, 521 U.S. at 874, 117 S.Ct. 2329.* Furthermore, the burden imposed by the government on speech must be outweighed by the benefits gained by the challenged statute. *See Elrod v. Burns, 427 U.S. 347, 363, 96 S.Ct. 2673, 49 L. Ed. 2d 547 (1976).*

*887 *[12]* As this court indicated in its August 8, 2000 Memorandum Opinion granting the plaintiffs' motion for a preliminary injunction, the 1999 Act is not narrowly tailored. In *Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2829, 106 L. Ed. 2d 93 (1989)*, the Supreme Court held that indecent speech, which is constitutionally protected for adults, may not be abridged in an effort to protect children unless the regulation is narrowly tailored to restrict only that speech expected to reach children. In contrast to the pre-amendment version held acceptable in *American Booksellers*, implementation of the 1999 Act will restrict the access of both adults and children. The critical fact that distinguishes the 1999 Act from its pre- amendment version is the former's inclusion of material on the Internet. The pre-amendment version of *section 18.2-391* applied only to traditional media in physical spaces, and thus made it possible to restrict minors' access to indecent material without substantially burdening adult access. For example, in a brick and mortar bookstore, a magazine considered harmful to minors can be wrapped in protective covering and placed behind the counter where only adults can purchase it. Presently, the same cannot be said for material on the Internet. That is, efforts to comply with the 1999 Act will result in the exclusion of too many adults from accessing material to be constitutionally sound.

**8 The defendants argue that minimally burdensome measures are available to commercial Internet pornographers who want reasonable assurances that juveniles will not peruse materials on their site. Furthermore, the defendants claim that execution of these measures will not unduly restrict adults' access to indecent material on the Internet. For example, the defendants contend that credit card identification systems can be used to verify that an individual accessing a Web site is an adult, presumably based on the shaky premise that credit cards are only issued to those who are at least eighteen years of

age. Furthermore, a number of Web sites condition access on the presentation of an adult identification number (PIN) issued to the user by any one of a number of independent third-party firms specializing in adult identification. Upon completion of an online application requiring name, address and a valid credit card number, adult identification firms issue one or two-year PINs to users for a fee of about seventeen dollars. Greg Miller, *Law to Control Online Porn Creates Strange Bedfellows*, L.A. Times, February 15, 1999, at A1. There are approximately twenty-five adult verification services on the web, and as of February 1999, the largest of these firms had issued approximately three million PINs which were accepted by approximately 46,000 Web sites. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 809 (2001)*. A Web site operator can sign up for free with most adult identification firms and the site can earn commissions of up to 50% to 60% of the fees generated by users who sign up with a particular adult verification service. *Id.*

Nevertheless, the plaintiffs argue that the use of PINs and similar adult verification systems poses a substantial burden on both adult Web sites and their adult visitors. For example, the verification measures cited by the defendants require viewers to transmit credit card and other personal information in order to receive a PIN and/or gain access to Web site content. The plaintiffs argue that this imposes a burden on the communication of adults who (1) have no credit card, (2) are unwilling to disclose financial and personal information over the Internet and (3) do not want to create a record of their interest in accessing "adult sites." The burden on potential Web site visitors may, in turn, reduce traffic to Web sites utilizing adult verification systems. *888*Reno II, 217 F.3d at 171*. This loss of traffic may inflict economic harm on a web site. *Id.* In addition, while the software needed to operate a PIN verification system is available at no charge to Web site operators, the

process of organizing prohibited content behind a Web site's adult screen imposes costs on Web site operators and content providers. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 809 (2001)*.

[13] While compliance with the 1999 Act may impose a financial burden on Web site operators,

**9 First Amendment jurisprudence indicates that the relevant inquiry is determining the burden imposed on the *protected speech* regulated by [the statute], not the pressure placed on the *pocketbooks or bottom lines* of ... Web site operators and content providers.... Strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of speech from the marketplace of ideas. *ACLU v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999)*.

The costs associated with implementing credit card screening devices and adult PIN systems are unlikely to drive adult Web sites from the "marketplace of ideas." The fact that thousands of adult Web sites currently utilize adult verification systems suggests that the burden associated with maintaining such a system is outweighed by continued consumer demand for the content these Web sites provide. Furthermore, because the 1999 Act is limited to material displayed for a commercial purpose, some of the concerns expressed by the Supreme Court in *Reno I* with regard to the CDA are inapplicable in this case. *See Reno I, 521 U.S. at 865, 117 S.Ct. 2329*. For example, commercial Web sites are less likely than noncommercial sites to be so burdened by the implementation of an adult identification system that they are forced to withdraw their content from the Internet. *[FN2]*

FN2. However, this court notes that the term "commercial purpose" may be subject to varying interpretation, and is undefined in the Act. This term

may include not only the traditional commercial Web sites on which this opinion focuses, but also content providers that allow users free access and profit through the use of advertising and other means. The use of adult verification systems may have a more significant financial impact on these free, but nevertheless commercial, content providers.

However, while this court does not find that the defendants' proposed compliance measures are overly burdensome on commercial Web sites, unlike the COPA and many other state statutes, the 1999 Act does not include an affirmative defense to prosecution for commercial Web sites if they in fact incorporate such compliance measures. Thus, even the most responsible adult Web sites may have legitimate concerns that they will be subjected to criminal liability in the state of Virginia. While the defendants urge this court to read a "good faith" affirmative defense into the 1999 Act, we are unwilling, and lack the authority, to add that which the legislature omitted. *[FN3]* Furthermore, even if, on a case by case basis, Web site operators could escape liability upon a showing at trial of efforts to exclude minors, this would do little to remove the chill associated with the uncertainty of facing criminal liability. The sword of Damocles causes harm because it hangs, not necessarily because it drops. See *Rafeedie v. INS, 880 F.2d 506, 530 n. 8 (D.C. Cir. 1989)* (Ginsburg, *889 J., concurring) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1023 (2d. ed. 1988)).

FN3. The government's request that a "good faith" affirmative defense be read into the 1999 Act reminds this court of an aphorism that was often used by the Virginia General Assembly when confronted with similar appeals: "Put not your faith in the good intentions of men. Write the law tight."

In addition, although the compliance measures recommended by the defendants are unlikely to have a substantial effect on commercial Web site operators, they may impose a significant burden on those seeking to access adult Web sites. The stigma often associated with these Web sites may deter some individuals from accessing the sites if admission is conditioned on the receipt of personal information. That is, many adults do not want to create a record of their visits to sexually explicit Web sites. Furthermore, many question whether it is possible to convey credit card information on the Internet in a secure manner. Fear that cyber-criminals may access their credit card numbers causes many individuals to abstain from making even the most uncontroversial purchases on the Internet. Thus, even if the proposed adult verification measures are unlikely to have a chilling effect on the speech of content providers, implementation of those measures may chill the willingness of some adults to participate in the "marketplace of ideas" which adult Web site operators provide. While the deterrent effect verification measures may have on some adults is by itself insufficient to subdue the state's compelling interest in assisting parents with the protection of their children, the Act's aggregate effect on adults, Web site operators and other content providers is substantial.

**10 Finally, despite the parties' focus on commercial adult Web sites, the Act applies broadly to the Internet and the many different communication formats it encompasses, including newsgroups, bulletin boards and chat rooms. *[FN4]* While the 2000 Amendment to *section 18.2-391* makes some attempt to exclude Internet service providers (ISPs) and electronic mail service providers from liability for the actions of their users, this amendment does not provide service providers with unconditional immunity. An ISP or email service provider may still be liable under the statute when they are responsible for creating the harmful

content, and one can even envision a circumstance in which a service provider could be held responsible for the actions of a third-party when it is suggested that the service provider "knowingly" condoned the availability of "harmful content." The defendants have failed to suggest that some equivalent to the adult verification measures currently available to commercial Web site operators exists with regard to ISPs and electronic email providers. Similarly, a bulletin board or newsgroup may confront liability under the 1999 Act. Bulletin board and newsgroup operators have less control over the content their forums present than traditional commercial Web sites, which limit user contribution. In contrast to Web sites devoted to adult material, the use of the adult verification measures recommended by the defendants on bulletin boards and newsgroups comes at the extremely high cost of preventing minors from accessing the abundance of material in those forums that has substantial social value. *[FN5]* That is, while the majority of messages *890 posted on a particular bulletin board or similar communication format may not be harmful to minors, users may be forced to put in their credit cards before accessing *any* of the board's content due to the potential that some inappropriate material may be posted.

> *FN4.* Note that the 1999 Act's broad application to the entire Internet is similar to that of the CDA, which the Supreme Court deemed unconstitutional. In an attempt to address this problem, Congress passed the COPA, which restricted its scope to material on the Web rather than the Internet as a whole. COPA defines the clause "by means of the World Wide Web" as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." *47 U.S.C. § 231(a)(1).*

> *FN5.* In *Reno II*, the district court suggested that the COPA would be narrower if its scope were limited to graphics and pictures, which constitute the predominant format of adult Web sites. While such an alteration to the 1999 Act would not, by itself, keep the Act from being deemed unconstitutional, it would make the Act more acceptable.

This court recognizes the need for some regulation of online content, and finds myopic the arguments of those who advocate an anarchical cyberspace. However, because, in the aggregate, the 1999 Act imposes a substantial burden on protected speech, its enforcement must be enjoined. Primarily, the often indefinite language of the 1999 Act, in conjunction with its lack of available affirmative defenses, makes compliance with its provisions exceedingly onerous. Additionally, the defendants fail to address the significant burden the 1999 Act imposes on bulletin boards, newsgroups and commercial Web sites that consist predominantly of material suitable for minors. The proposed compliance measures may also chill the willingness of adults to access adult Web sites.

Furthermore, the 1999 Act's impotence weighs against it. This court acknowledges that no law is perfect in its application, and that some minors will always manage to access that which is forbidden to them. However, as the plaintiffs correctly assert, the global nature of the Internet assures that even the most stringent laws in the United States are unlikely meaningfully to limit access to adult material available on Web sites based in other countries. Currently, technology is incapable of preventing content originating abroad from being accessed by Web users in the United States. Thus, even if the 1999 Act were to be upheld, minors in Virginia would have access to a substantial amount of indecent material on servers outside of the country. That is, "unlike statutes that are ... differentially

enforced in different areas, yet are still justified because they limit harm to some extent in the local areas in which they are actively enforced ... [the 1999 Act] applies to the Internet, which by its nature has no local areas." Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act, 10 Harv. J.L. & Tech. 113, 131 (1996)*. The inability of the 1999 Act to support effectively the compelling interests at issue makes it difficult to justify the burden the Act imposes on protected speech.

A. Commerce Clause Challenge

**11 The plaintiffs also contend that the Act must be struck down because it contravenes the Commerce Clause. *See* U.S. Const. *Art I., § 8, cl. 3*. Although this court need not address the Commerce Clause arguments, as the First Amendment claim is sufficient to carry the day, the Commerce Clause will be discussed in brief.

[14] The negative implication of the Commerce Clause, U.S. Const. *Art I., § 8, cl. 3*, includes a prohibition on state regulation that "discriminates against or unduly burdens interstate commerce" and thereby "imped[es] free private trade in the national marketplace." *General Motors Corp. v. Tracy, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L. Ed. 2d 761 (1997)* (citing and quoting *Reeves, Inc. v. Stake, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L. Ed. 2d 244 (1980)*); *see also South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 170-71, 119 S.Ct. 1180, 143 L. Ed .2d 258 (1999)* (declining invitation to abandon negative commerce clause jurisprudence). State statutes similar to *Virginia Code § 18.2-391* have been found to burden interstate *891 commerce unduly by placing restrictions on electronic commercial materials in all states, not just the state in which the statute was enacted. The leading case applying the dormant Commerce Clause in this manner is *American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997)*.

In *American Libraries Ass'n*, the court determined that, because there was currently no way to limit access to online materials by geographic location, a Web site owner operating legally in California could be deemed to have sent prohibited content to, and thus be subjected to liability in, New York. Faced with the potential for prosecution in New York, the California Web site may be deterred from making adult material available on the Internet. In effect, the New York statute would have discouraged legitimate commerce wholly outside New York's borders and thus imposed an undue burden on Interstate commerce.

[15] The plaintiffs in this case echo the *American Libraries Ass'n* court's concern regarding a state statute's extraterritorial effect on commerce. However, it should be noted that many legitimate state regulations impose out-of-state costs. Most relevant to this case are state obscenity regulations on providers of real-space pornography. These providers must comply with the varying regulations of those states and localities to which they distribute. State obscenity regulations are not invalidated under the Commerce Clause because they impose compliance costs on businesses located outside their state's borders. *[FN6]*

FN6. For a helpful discussion regarding the application of the dormant Commerce Clause on the Internet, *see* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 809 (2001)*

[16] Nevertheless, state laws regulating cyberspace pornography currently impose a much greater burden on out-of-state businesses providing adult material on the Internet than state laws regulating real-space pornography impose on out-of-state adult magazine publishers and other real-space pornography providers. While some advancement has been made since *American Libraries Ass'n* was decided, it remains technologically infeasible for a

Web site operator to limit access to online materials by geographic location. Thus, to avoid prosecution, an adult Web site operator must comply with the most restrictive state obscenity regulations if it is to make its content available on the Web at all. In contrast, purveyors of real-space pornography can choose to comply with the regulations of only those states to which they affirmatively distribute. This leads the court to conclude that, due to the current status of geographic filtering technology on the Internet, *section 18.2-391* violates the Commerce Clause.

III.

**12 In accordance with the foregoing, the plaintiffs' motion for summary judgment shall be granted. An appropriate order this day shall enter.

ORDER

**1 On May 17, 2001, the plaintiff moved for summary judgment in the above- styled case. A hearing was held on the motion on July 27, 2001. For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED ORDERED AND DECREED

that:

1. The plaintiff's Motion for Summary Judgment, filed May 17, 2001, shall be, and it hereby is, GRANTED.

*892 2. The defendants shall be, and hereby are, permanently enjoined and prohibited from enforcing *Va. Stat. § 18.2-391* to the extent it prohibits the sale, rental, loan or display of an "electronic file or message containing an image" or an "electronic file or message containing words."

The Clerk of Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs, v. JANET NAPOLITANO, et al., Defendants.	No. CV-00-0505-TUC-AM ORDER

Based upon plaintiffs' Motion for Temporary Restraining Order and Expedited Preliminary Injunction Hearing and the pleadings submitted therewith, the Court makes the following Findings of Fact:

(i) That the potential harm to the plaintiffs is irreparable;

(ii) That defendants will not be harmed by the issuance of a Temporary Restraining Order;

(iii) That a Temporary Restraining Order will not affect the interests of third parties, including the public interest; and

(iv) That plaintiffs are likely to succeed at least partially on the merits of their claim that A.R.S. § 13-3506(1) is unconstitutional.

IT IS HEREBY ORDERED:

That defendants are enjoined from enforcing A.R.S. § 13-3506.01 pending further order of this Court.

Further, it is ordered that a scheduling conference will take place on October 12, 2001 at 1:30 p.m. to determine a date on which a consolidated trial and preliminary injunction hearing can take place.

Further, it is ordered that plaintiffs post security in the amount of ten (10) dollars.

DATED this 12th day of October, 2001.

_____/s/_____
Alfredo C. Marquez
United States District Judge